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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1586

DOROTEA ZALDIVAR V. DE TENORIO,
Petitioner,

vs.

H. E. McGOWAN, ET AL.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions for Review 3

Treaty and Constitutional and Statutory Provisions Directly Involved 6

Statement of the Case 8

Summary of Argument 10

Argument—

- I. General 14
- II. Due Process of Law 17
  - A. Notice 18
  - B. Fair Play 19
  - C. Non-Discrimination Required 20
- III. Treaty Construction Must Be Liberal 27
- IV. Payment of Just Compensation 33
- V. Intrusion of State into Foreign Affairs to Be Avoided 34

Conclusion 36

Appendix—

- A. Opinion of District Court: 364 F. Supp. 1051 (DC Miss. 1973) A1
- B. Opinion of Court of Appeals: 510 F.2d 92 (CA5, 1975) A23
- C. Petition for Rehearing (Addendum omitted) A69
- D. Opinion on Petition for Rehearing (CA5, 1975) A84
- E. Treaty of Friendship, Commerce and Consular Rights with the Republic of Honduras, Articles I through IV A88
- F. Mississippi Code of 1972, §89-1-23 A93
- G. Schedule of Treaties Affected by Decision A94

Table of Authorities

CASES

Asakura v. *City of Seattle*, 265 U.S. 332, 44 S. Ct. 515 (1923) 12, 17, 29

Bacardi Corporation of America v. *Domenech*, 311 U.S. 150, 61 S. Ct. 219 (1940) 12, 29

Blythe v. *Hinckley*, 180 U.S. 333, 21 S. Ct. 390 (1901) 24

Clark v. *Allen*, 331 U.S. 503, 67 S. Ct. 1431 (1947) 14

DeGeoffroy v. *Riggs*, 133 U.S. 258, 10 S. Ct. 295 (1890) 30

Dutton v. *Donahue*, 8 P.2d 90, 79 A.L.R. 1355 (Wyo. 1932) 32

Factor v. *Laubenheimer*, 290 U.S. 276, 54 S. Ct. 191 (1933) 12, 28

Galvan v. *Press*, 347 U.S. 522, 74 S. Ct. 737 (1954) 19

Graham v. *Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971) 20

Guiseppe v. *Cozzani*, 118 So.2d 189 (1960); 159 So.2d 278 (1964); 193 So.2d 549 (1966) 26

Havenstein v. *Lynham*, 100 U.S. 483, 25 L. Ed. 628 (1879) 12, 25, 29

Johnson v. *Robinson*, 94 S. Ct. 1160 (1974) 13, 22

Jordan v. *Tashiro*, 278 U.S. 123, 49 S. Ct. 47 (1928) 29

Oyama v. *State of California*, 332 U.S. 633, 68 S. Ct. 269 (1948) 21

Quong Ham Wah Co. v. *Industrial Accident Commission*, 192 Pac. 1021, 12 A.L.R. 1190, error dism. 255 U.S. 445, 41 S. Ct. 373 (Cal. 1920) 27

Robinson v. *Hanrahan*, 409 U.S. 38, 93 S. Ct. 30 (1972) 18

Schroeder v. *City of New York*, 371 U.S. 208, 83 S. Ct. 279 (1962) 18

Sugarman v. *Dougall*, 413 U.S. 634, 93 S. Ct. 2842 (1973) 21

Sullivan v. *Kidd*, 254 U.S. 433, 41 S. Ct. 158 (1920) 30

Terrace v. *Thompson*, 263 U.S. 197, 44 S. Ct. 15 (1923) 20, 21, 23

Todok v. *Union State Bank of Harvard, Nebraska*, 281 U.S. 449, 50 S. Ct. 363 (1930) 13, 25, 30

Weinberger v. *Wisenfeld*, 95 S. Ct. 1225 (1975) 13, 22, 26, 27

Zschernig v. *Miller*, 389 U.S. 429, 88 S. Ct. 664 (1968) 13, 35

TREATIES

Treaty of Friendship, Commerce and Consular Rights with Honduras, 45 Stat. at Large 2618 (December 7, 1927) 3, 6, 8

- Article I 3, 4, 6, 11, 13, 14, 15, 16, 17, 21, 27, 28, 30, 31, 34
- Article IV 3, 4, 6, 11, 13, 14, 16, 26, 27, 30, 32, 34

Treaty with Brunei, 10 Stat. 909, Art. III (1850) 15

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—

- Fourth Amendment 27
- Fifth Amendment 18, 22, 33
- Sixth Amendment 7
- Fourteenth Amendment 18, 20, 21, 22, 23

Miss. Code 1972—

- §15-1-13 9
- §89-1-23 7
- §91-1-7 18

28 U.S.C. §1331 8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Dorotea Zaldivar V. de Tenorio, joined by co-appellees below, respectfully prays issuance of a writ of certiorari to review the majority judgment of a panel of the Court of Appeals for the Fifth Circuit, which reversed the United States District Court for the Southern District of Mississippi, Judge Godbold dissenting.

Directly involved is the "Treaty of Friendship, Commerce and Consular Rights" between the United States and the Republic of Honduras.

Despite property rights guaranteed by the express terms of the Treaty, the decision of the majority construed this Treaty to allow a forfeiture by Honduran Nationals of a tract of Mississippi land under a state statute prohibiting aliens, with some exceptions, from holding Mississippi land.

As later shown in detail, the majority opinion (1) misapplies the Treaty; (2) adopts a strict and narrow rule of construction contrary to the decisions of this Court; (3) allows invidious discrimination by state statute against aliens of the same class at odds with the purpose and policy of Treaties of Amity and Commerce, contrary to the decisions of this Court; (4) fails to apply the Treaty's express mandate that the Nationals shall receive "the most constant protection and security for their persons and property" and that their property "shall not be taken without due process of law and without payment of just compensation;" and (5) sets a harmful precedent which could adversely affect foreign relations with friendly nations and reciprocal property rights of the Nationals under numerous Treaties of friendship and commerce with nations around the world.

OPINIONS BELOW

Dorotea Zaldivar V. de Tenorio v. *H. E. McGowan*, 364 F. Supp. 1051 (DC Miss. 1973) (Apx. A, A1)

Dorotea Zaldivar V. de Tenorio v. *H. E. McGowan*, 510 F.2d 92 (CA5, 1975) (Apx. B, A23); also Opinion denying Petition for Rehearing (Apx. D, A84)

JURISDICTION

The judgment of the Court of Appeals was dated and entered on March 19, 1975, reversing the judgment of the District Court which was dated October 30, 1973 and entered on November 6, 1973. An order of the Court of Appeals denying a petition for rehearing is dated May 27, 1975.

The case involves the construction and application of a Treaty. 45 Stat. 2618. Jurisdiction is conferred by Article III, Section 2, *United States Constitution*, and 28 *U.S.C.* 1254(1).

QUESTIONS FOR REVIEW

In relation to the right to acquire and hold title to land which is granted to Nationals of the High Contracting Parties under the terms of the Treaty of Friendship, Commerce and Consular Rights between the United States and the Republic of Honduras (45 Stat. 2618) but withheld in terms of a local (Mississippi) statute which would prohibit some (but not all) non-resident aliens from acquiring or holding land, and in the context specifically of treaty provisions which guarantee first that the Nationals in the respective territories of each other:

> ". . . shall receive . . . the most constant protection and security for their persons and property. . . . Their property shall not be taken without due process of law and without payment of just compensation." (Art. I),

and finally, that if the aliens are disqualified to take and hold land by local law, then they:

> ". . . shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary." (Art. IV),

the questions which, in the circumstances of this case, arise are:

1. What is meant by the guarantee in Article I of the Treaty that the Nationals shall receive the "most constant protection and security" for their property, when read and considered with the further guarantees that their property will not be taken "without due process of law and without payment of just compensation", when these broad guarantees are called into question by the failure to sell the land within the three year minimum time mentioned in Article IV; or, more specifically: is the minimum term

of three years to be reasonably prolonged in circumstances where a widowed Honduran National inherits Mississippi land from her husband, a citizen of the United States, and throughout her remaining eleven years of life continues to be unaware of her rights and even of the fact of her inheritance and is uninformed by her husband's brother, a fiduciary, who secretly intended to claim the land as his own by a false assertion of a parol gift and by adverse possession.

2. If Article IV of the Treaty requires a sale in three years as a minimum time allowance in deference to local law, when, under the open-end terms of this Article, is the minimum term to be reasonably prolonged, and if to be prolonged, what prolongation is reasonable and what circumstances render it necessary, especially in light of the "most constant protection and security" and "due process of law" guaranteed by Article I.

3. Are treaty guarantees satisfied by the decisional construction which would take away the property of the National:

A. By mere passage of time (3 years), plus neglect or failure to inquire or search public records, when, as here, the affected National remains uninformed and ignorant of her rights and of the very fact of her inheritance; or

B. Unless, on pain of a forfeiture, a sale is made at all events, within the minimum three years, or unless, in terms of the panel decision, the Honduran National is actually *prevented* from selling by "an inability to satisfactorily clear title, an inability to sell for fair market value, willful frustration of the effort to sell, and like events," when no such conditions are incorporated in the Treaty.

4. Is the Treaty to be given a liberal construction in favor of claims made under it, as indicated by decisions of this Court, or a strict and narrow and strained construction, adverse to such claims, as imposed by the majority panel decision of the Court of Appeals.

5. Does the incorporation into the Treaty of the provision that "Their property shall not be taken without due process of law and without payment of just compensation" prevent a taking without previous notice of any kind and without payment of compensation?

6. May a state discriminate by its statute so as to allow some non-resident aliens to inherit and hold land and deny the same right to other aliens, especially to those to whom the United States has guaranteed the most constant protection and security for their persons and property, as well as due process of law and just compensation?

7. Should not the Treaty guaranty of the "most constant protection and security for their persons and property" serve to elevate the Treaty Nationals to a degree of protection and security at least equal to that expressly afforded by local law to other non-resident aliens selected by name (in this case Syria and the Lebanese Republic), whose status differs only in terms of national origin, especially when the Treaty Nationals are to receive in the territories of each other "due process of law."

8. Does a state statute which assumes to pick and choose among aliens, favoring some and omitting others impermissibly intrude upon the federal power in the field affecting foreign relations?

TREATY AND CONSTITUTIONAL AND STATUTORY PROVISIONS DIRECTLY INVOLVED

Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras (December 7, 1927). 45 Stat. at Large 2618 (Apx. E, A88).

EXCERPTS—ARTICLE I

> "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.
>
> "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation."

EXCERPTS—ARTICLE IV

> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such

property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

CONSTITUTION OF THE UNITED STATES

ARTICLE VI

"2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

MISS. CODE 1972, §89-1-23 (EXCERPTS)

(Apx. F, A93-A94)

"Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may; but non-resident aliens shall not hereafter acquire or hold land, . . ."

"Provided, further, non-resident aliens who are citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the state of Mississippi."

STATEMENT OF THE CASE

The federal jurisdiction in the Court of first instance was based upon the existence of federal questions, especially Treaty questions. 28 *U.S.C.*, §1331. *Tenorio* v. *McGowan*, 364 F. Supp. 1051 (1973) (Apx. A, A3).

The District Court found that the Honduran Nationals were protected in their property rights under the circumstances of the case by the letter and spirit of the Treaty of Friendship, Commerce and Consular Rights with the Republic of Honduras (45 Stat. 2618) despite a Mississippi statute which itself protected some named aliens but withheld its protection from others, including Honduran Nationals among those not so favored. The circumstances are those outlined below.

The land was acquired by Elbert J. McGowan about 1915. Appellant, Hamilton E. McGowan, was Elbert's brother and both lived, at the time, in Vossburg, in rural Clarke County, Mississippi. About this time Elbert left for Central America and returned infrequently.

On leaving, Elbert entrusted his land to his brother Hamilton, who agreed to look after the place and pay the taxes "as a favor to his brother and for use of said land."[1]

In 1940, Elbert married a native Honduran, Maria Obdulia Zaldivar, and lived with her in Central America until his death, seventeen years later. Neither Elbert nor his Honduran wife changed citizenship. Elbert never brought his wife, a non-white, to Clarke County, Mississippi. She spoke very little English. Maria Obdulia Zaldivar McGowan was Elbert's sole heir.

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[1] This arrangement continued without interruption or change until August 14, 1968, as explained later.

Elbert's passport named his brother Hamilton as a person to be notified in case of his death. When Elbert died in 1957, Hamilton was so notified in writing by the United States consul in Panama. This notice revealed that Elbert was survived by his Honduran widow and gave her name and address. Hamilton received a written notice and his attorney produced it for the trial.

Elbert's widow had no knowledge of Elbert's land ownership in Clarke County. No formal administration was opened upon his estate in Mississippi, but his brother, Hamilton, had the land tax assessment changed from Elbert (E. J.) McGowan to the "E. J. McGowan Est."

Hamilton did not communicate with Elbert's widow or make any effort to do so, but continued to manage Elbert's land as he had done prior to his death, using the land then assessed to his brother's estate and keeping the profits for the payment of taxes just as before.

This went along without change until August 14, 1968, when Elbert filed a suit in the Chancery Court asserting publicly for the first time, title to Elbert's land by "adverse possession," claiming a parole gift in 1936.[2] This suit sought to deprive Elbert's widow of her inheritance. While Hamilton named his brothers and sisters as defendants, exclusive of Elbert, of course, these were friendly parties, and no effort whatever was made to notify Elbert's widow. In default of an answer by the friendly defendants, Hamilton took a decree purporting to confirm title in himself.[3] He then had the tax assessment changed again, this time from "E. J. McGowan Est." to himself, "H. E. McGowan".[4]

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[2] Miss. Code 1972, §15-1-13. Ten years open hostile possession under claim of title will vest title in the claimant, but if possession is permissive, there must be a legal "ouster" of the record title owner, which requires notice.

Elbert's widow died several months later in Honduras on February 28, 1969, still ignorant of her Mississippi inheritance and wholly unaware of the proceedings designed to take away the land and vest it in Hamilton by a claim of parole gift and "adverse possession."

Elbert's widow was survived by a sister, the appellee, Dorotea Zaldivar V. de Tenorio, with whom she had lived in Honduras since her husband's death in 1957, and one brother, whose assignees are parties also. After her sister's death, Dorotea learned of Elbert's land in Mississippi, when she was approached to give an oil lease. The present suit followed and was filed on April 12, 1971, two years after Obdulia's death.

SUMMARY OF ARGUMENT

This case involves the construction of a Treaty. In its broader aspects, it involves the opportunity for this Court to delineate the principles on which treaties, dealing with reciprocal real property rights of the Nationals of the High Contracting Parties, are to be construed and applied, having, of course, in mind that the precedent in the making here will have its effect, both here and abroad, upon the application of numerous treaties of friendship and commerce to which this country is committed.

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[3] The District Court held that this decree was void as to Obdulia for lack of due process notice and appellants abandoned any claim thereunder, but the proceedings serve to show Hamilton's hostility toward Elbert's widow and his determination to deprive her of her rightful inheritance without notice.

[4] Judge Godbold, in his dissenting opinion, observed that Hamilton's misconduct toward his brother's widow was "too strong for the nostrils of an able and experienced trial judge. It is too strong for mine as well." (510 F.2d at 103) (Apx. B, A48).

As shown by the "Schedule of Treaties Affected by Decision" (Apx. G, A94), at least 23 treaties use terminology identical with or similar to that found in Article IV of the Honduran Treaty.

This Court has not heretofore had occasion to construe either Article IV or its equivalent or the Article I unique provision that the Nationals of each High Contracting Party:

> ". . . shall receive . . . the most constant protection and security for their persons and property. . . . Their property shall not be taken without due process of law and without payment of just compensation."

The panel majority of the Court of Appeals simply brushes the Article I guarantees aside as being irrelevant to the question of forfeiture by the passage of time which is mentioned in Article IV, finding nothing in Article I to influence the prolongation of time "to be" allowed under Article IV "if circumstances render it necessary."

Indeed, with some overtones of outright hostility, Judge J. P. Coleman, writing for the two-Judge majority, commits the Court to a narrow and restricted and even a strained construction, importing into the Treaty, by judicial construction, several stringent conditions which are not to be found anywhere in the language of the Treaty itself.

The result is that the one and only published Federal Court precedent dealing with real property rights under treaties of friendship and commerce with the numerous countries around the world adopts not a liberal construction but a narrow and strained construction hostile to rights claimed under such treaties. This flies in the face of the general principles heretofore articulated by this Court for the construction of treaties of friendship and commerce among nations.

Another far-reaching aspect of the case is the invidious discrimination implicit in the refusal of the panel majority to accord to Nationals of the Republic of Honduras property rights at least equal to those granted by Mississippi statute to chosen aliens of other countries.

Specifically, the Court of Appeals approach violates certain relevant principles to which this Court is committed and which are noted below in brief summary.

Treaties take their place along with the Constitution and statutes of the United States as the supreme law of the land. Each treaty writes itself into the law of every state and territory of the United States. *Asakura* v. *City of Seattle,* 265 U.S. 332, 44 S. Ct. 515 (1923); *Havenstein* v. *Lynham,* 100 U.S. 483, 25 L. Ed. 628 (1879).

Treaties of friendship and commerce must be liberally construed to carry out the intended purpose. Treaties are never to receive a narrow and restricted construction, but are to receive a broad and liberal construction, to the end that if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging those rights, the more liberal construction is to be adopted. *Factor* v. *Laubenheimer,* 290 U.S. 276, 54 S. Ct. 191 (1933); *Bacardi Corporation of America* v. *Domenech,* 311 U.S. 150, 61 S. Ct. 219 (1940).

The "general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other." *Todok* v. *Union State Bank of Harvard, Nebraska,* 281 U.S. 449, 50 S. Ct. 363 (1930).

Discrimination is also prohibited by the treaty provision of Article I that, "Their property shall not be taken without due process of law . . ." because the concept of "due process of law," as found in the analogous constitutional equivalent, proscribes invidious discrimination in any form and this Court has expressly so held. *Johnson* v. *Robinson,* 94 S. Ct. 1160 (1974), footnote 4; *Weinberger* v. *Wisenfeld,* 95 S. Ct. 1225 (1975), footnote 2.

In sum, the majority decision below ignores Article I of the Treaty entirely and gives to Article IV a narrow and restrictive construction and involves the Court in the allowance of permissible discrimination against federally favored treaty nationals, all of which is contrary to the principles articulated by this Court in past cases.

Finally, by its refusal to equate the rights of other non-resident aliens to those selected for favor by Mississippi statute and thus allowing a state to pick and choose among foreign nations for favoritism, the decision below even poses a challenge to the power of the federal government exclusively to determine foreign policies and regulate foreign affairs. Cf. *Zschernig* v. *Miller,* 389 U.S. 429, 88 S. Ct. 664 (1968).

These and other fallacies underlying Judge Coleman's opinion were set forth in appellee's petition for rehearing which is appended to this brief (Apx. C, A69). Compare, also, the dissent of Judge Godbold (510 F.2d at 102, et seq.).

ARGUMENT

I. General

The Treaty of Friendship, Commerce and Consular Rights with the Republic of Honduras has never been construed by this Court or by any other Court prior to the present case.

The Court has not heretofore construed the language found in Article IV in the context of the three years to sell, with this term "to be reasonably prolonged if circumstances render it necessary," except to hold that such a provision confers the right of ownership and the right to inherit. *Clark* v. *Allen*, 331 U.S. 503, 67 S. Ct. 1431 (1947).

Among the current treaties dealing with property rights, twelve (12) have the same provision as found in Article IV of the Honduran Treaty and eleven others have similar provisions, from which it follows that at least twenty-three major treaties will be affected in some degree by the precedent set here (See Apx. G, A94, Schedule of Treaties Affected by Decision).

Construction of Article I is also important in the area of international law, because of its unique Article I provision for the protection of reciprocal property rights of the Nationals in the territories of each other in terms of unrestricted "due process of law and the payment of just compensation":

> "Their property shall not be taken without due process of law and without payment of just compensation." (Art. I, Fourth Paragraph).

The Honduran Treaty is close to being unique[5] also, in its further Article I provision that the Nationals of each High Contracting Party shall receive within the territories of the other "the most constant protection and security for their persons and property." (Art. I, Fourth Paragraph).

Certainly, up to this point, stronger terms could not be found to allow for the protection of property rights equal at least to those of resident citizens, and resident aliens, who are allowed to hold title and freely dispose of the same at will.

The Honduran Nationals inherited from Maria Obdulia Zaldivar McGowan, the widow and sole heir of Elbert McGowan, who in turn inherited from her husband on his death in 1957. The question is not whether the widow inherited the title but whether she lost her admitted inheritance by a mere lapse of more than three years in time before her death in 1969, which also calls into question the proper application of the further provision of Article IV that if local law disqualifies aliens from acquiring and holding land, then the treaty nationals:

> ". . . shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary."

The Honduran widow survived her husband by eleven years, during which time she was uninformed and ignorant of her inheritance of Mississippi land, and her husband's brother, in whose care the land had been entrusted, did not choose to inform her but secretly began to claim the land for himself.

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[5] Cf. Treaty with Brunei, which provides for "Complete protection and security." 10 Stat. 909, Art. III (1850).

Since the time lapse was beyond the three year minimum mentioned in Article IV, during which time the widow, being ignorant of her ownership, made no effort to sell the land, construction focuses upon the proviso that the minimum term is "to be reasonably prolonged if circumstances render it necessary."

The panel majority of the Fifth Circuit construed Article IV as imposing a loss of title unless the National acts to sell within the minimum three year term except when prevented from so doing, after first making an effort to sell, by circumstances beyond the National's control, saying:

> "We construe 'circumstances rendering the action nececessary' to mean circumstances existing during the three year period, such as an inability to satisfactorily clear title, an inability to sell for fair market value, wilful frustration of the effort to sell, and like events."

This construction added restrictive words to the Treaty which are not to be found anywhere in that document. It is not only narrow but even strained. The fact of the widow's ignorance of her rights and even of the existence of her ownership was found to be irrelevant. This was on the view that the non-resident Honduran National was bound to inquire after her rights and to seek out and examine the public land records to determine the fact of her husband's ownership of the land and to act at her peril within the three year minimum time.

The construction below ignores Article I completely and borrows nothing from its admonitions for the "most constant protection and security," consistent with "due process of law" and the "payment of just compensation."

At the very least, the construction by the panel majority violates two rules settled by the decisions of this Court for the construction and application of treaties. One is the rule demanding a broad and liberal construction in favor of treaty claims. The other is the rule which recognizes the duty to regard the general purpose of treaties of amity and commerce to avoid injurious discrimination in either treaty country against the citizens of the other, especially where, as here, other non-resident aliens, differing only as to national origin, are expressly allowed by local statute to inherit and hold land.

II. Due Process of Law

While the Treaty with Honduras rings a familiar constitutional bell, it carries its own distinctive protection and securities in relation to property rights and contains its own proscriptions against the taking thereof, saying simply and without qualification of any sort:

> "Their property shall not be taken without due process of law and without payment of just compensation." Art. I.

The Treaty operates by its own force and stands equal to our Constitution in supremacy as the law of the land. As put in *Asakura* v. *City of Seattle*, 265 U.S. 332, 44 S. Ct. 515 (1924):

> ". . . It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. . . ." (44 S. Ct. at 516).

The Treaty does not say who may not take their property but simply that their property shall not be taken without due process of law and payment of just compensation. And to add vigor to the proscription against the taking, it provides, in the same Article, that the Nationals shall receive in the territories of each other "the most constant protection and security for their persons and property."

In Mississippi, a widow, absent children and apart from alienage, inherits the whole of her husband's estate.[6]

Since the Treaty stands on its own and is unqualified in its proscription against taking property and, therefore, is broader in scope than the Fifth and Fourteenth Amendments to the Constitution, there is no necessity for inquiry into such questions as whether a Honduran is a "person" or "any person" or is one within the "jurisdiction" of a state which seeks to discriminate, as those terms are used in our Constitution. However, recourse may be had, by way of analogy, to the decisions of this Court involving the scope of "due process of law" as applied to those entitled to its protective sweep.

We approach the due process questions from the viewpoint of its three most relevant requirements, namely: (1) notice, (2) fair play, and (3) non-discrimination or equal protection of the law.

A. Notice

The requirement of notice is exemplified by *Schroeder* v. *City of New York,* 371 U.S. 208, 83 S. Ct. 279 (1962), and *Robinson* v. *Hanrahan,* 409 U.S. 38, 93 S. Ct. 30 (1972).

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[6] Miss. Code 1972, §91-1-7: "If a husband die intestate and do not leave children or descendants of children, his widow shall be entitled to his entire estate, real and personal in fee simple, after payment of his debts. . . ."

This statute does not except non-resident aliens. It is by another separate statute that non-resident aliens, with certain exceptions, are prohibited from acquiring and holding land. See §89-1-23 (Apx. F, A93).

As applied to this case, we begin with the fact that the Honduran widow inherited the Mississippi land from her husband. She died eleven years later in ignorance of her inheritance. If the decision below stands, she will have lost her land to her husband's brother, who would take the land by force of the mere passage of time without any notice being given to the widow whatever.

The majority panel of the Court below decided that the notice required was met by reason of the fact that the title was a matter of record and could have been discovered within three years by an effective inquiry and search of the title records in Clarke County, Mississippi.

On the contrary, we respectfully submit that due process required more, especially in the face of the solemn treaty promise that Honduran Nationals were to receive the most constant protection and security for their property.

B. Fair Play

Closely related to the notice requirement is that of fair play. This "fair play" aspect of due process as applied specifically to aliens is enunciated in *Galvan* v. *Press*, 347 U.S. 522, 74 S. Ct. 737 (1954).

In this case, the husband's brother knew of the survival of the widow but made no effort to inform her of her inheritance. Instead, he secretly devised a plan to claim the land adversely for himself. Under the most restrictive term of the Treaty, the widow was allowed three years to sell the land, followed by the proviso that "this term to be reasonably prolonged if circumstances render it necessary."

This was "foul" play, not the "fair" play that due process requires.

Another aspect of fair play has to do with this Court's mandate for the liberal construction of treaties of amity and commerce among nations, which is discussed in part III infra.

C. Non-Discrimination Required

The excuse given for discrimination against aliens, in the absence of overriding treaties, has been called the "special public-interest doctrine." In relation to the ownership of land, the doctrine articulates itself in the context of the special public interest in reserving the land to those who are citizens or at least to those who reside within the state. The theory is that non-residents do not effectually work for the welfare of the state. *Terrace* v. *Thompson*, 263 U.S. 197, 44 S. Ct. 15 (1923).

But the *discrimination* on this basis is not only violative of the Treaty's "due process of law" mandate, but is without a rational basis, because non-resident citizens of other states and non-resident aliens who happen to be citizens of Syria or the Lebanese Republic are no less ineffectual as welfare workers than are non-resident citizens of other countries, such as the Republic of Honduras.

Moreover, recent decisions of our Court have cast doubt upon the special public-interest doctrine in all contexts, including the denial to aliens of the right to acquire and own land. In *Graham* v. *Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971), for example, this Court in invalidating discrimination against aliens by state welfare laws under the Fourteenth Amendment, said:

> ". . . On the same theory (special public-interest), the Court has upheld statutes that, in the absence of overriding treaties, limit the right of noncitizens to engage in exploitation of a State's natural resources,

> restrict the devolution of real property to aliens, or deny to aliens the right to acquire and own land.
>
> "Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 68 S. Ct. 1138, 92 L.Ed. 1478 (1948), however, cast doubt on the continuing validity of the special public-interest doctrine in all contexts. There the Court held that California's purported ownership of fish in the ocean off its shores was not such a special public interest as would justify prohibiting aliens from making a living by fishing in those waters while permitting all others to do so. . . ." (91 S. Ct. 1853).

See also: *Sugarman* v. *Dougall,* 413 U.S. 634, 93 S. Ct. 2842 (1973), and cf. *Oyama* v. *State of California,* 332 U.S. 633, 68 S. Ct. 269 (1948), as casting further serious doubt on the right of a state to exclude aliens under *Terrace* v. *Thompson,* 263 U.S. 197, 44 S. Ct. 15 (1923), and related cases, from acquiring and holding land.

True, these cases deal with resident aliens who are entitled to the benefits of the Fourteenth Amendment, but it is equally true that the Honduran Treaty carries the constitutional equivalent in its Article I guarantee of "due process of law" and "just compensation."

But here again, it is unnecessary to re-examine *Terrace* v. *Thompson,* supra, in the light of subsequent cases, because the invidious discrimination against the federally favored nationals of the Republic of Honduras can easily be eliminated by simply affording to Hondurans equal treatment under the law. And this may be done by a fair and equitable, and certainly by the required liberal, construction and application of the Treaty provisions: "Their property shall not be taken without due process of law and without payment of just compensation." (Art. I).

Like the Fifth Amendment, the Treaty equivalent makes no express reference to the "equal protection of the laws," such as is found in the Fourteenth Amendment and made applicable to "any person" without the jurisdiction of a state. However, an unjustifiable discrimination violates the concept of "due process of law". As said in *Johnson* v. *Robinson*, 94 S. Ct. 1160 (1974), footnote 4:

> "Although 'the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." ' Schneider v. Rusk, 377 U.S. 163, 168, 84 S. Ct. 1187, 1190, 12 L. Ed. 2d 218; see Frontiero v. Richardson, 411 U.S. 677, 680 n. 5, 93 S. Ct. 1764, 1767, 36 L. Ed. 2d 583 (1973); Shapiro v. Thompson, 394 U.S. 618, 641-642, 89 S. Ct. 1322, 1335, 22 L. Ed. 2d 600 (1969); Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. See Richardson v. Belcher, 404 U.S. 78, 81, 92 S. Ct. 254, 257, 30 L. Ed. 2d 231 (1971)."

Also: *Weinberger* v. *Wisenfeld*, 95 S. Ct. 1225 (1975), especially footnote 2, and cases cited.

The Treaty guaranty of "due process of law" to Honduran Nationals is at least equal to the due process mandate of the Fifth Amendment as it applies to require the equal protection of the laws equivalent in scope to the Fourteenth Amendment's proscription against discrimination.

Since Mississippi allows some non-resident aliens to inherit and hold land without restriction, this raises the question of whether the state may, by its statute, effectively discriminate in favor of non-resident aliens of its own selection but adversely to other non-resident aliens, especially those to whom the United States has solemnly promised the most constant protection and security, coupled with assurances of due process and just compensation; or, to put the matter the other way around: is a Honduran National who is so thus favored by a Treaty with the United States entitled to treatment at least equal to other non-resident aliens favored by state law, where the only basis for classification is one of national origin?

The state statute first provides that "resident aliens" may acquire and hold land; then that "non-resident aliens shall not hereafter acquire or hold land," and finally:

> "Provided, further, non-resident aliens who are citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the State of Mississippi."

Equal treatment of "resident aliens" with citizens finds compulsion under the Fourteenth Amendment, and the statute provides for equal treatment. It then disfavors "non-resident" aliens as compared with citizens and resident aliens. If it had stopped here, *Terrace* v. *Thompson*, 263 U.S. 197, 44 S. Ct. 15 (1923) might be cited as justification for the classification, absent an overriding treaty.[7]

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[7] The Court, in *Terrace* v. *Thompson*, 263 U.S. 197, 44 S. Ct. 15 (1923), was careful to limit the permissible exclusion of non-resident aliens to enactments which treated *all* aliens *equally*, saying:

> "State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause." (44 S. Ct. at 19).

As noted previously in this brief, much doubt has been cast upon the doctrine cited in support of *Terrace* v. *Thompson*, supra, even when all aliens are treated alike.

But it did not stop here. It proceeded to attempt to classify "non-resident" aliens as among themselves. Specifically, it chose non-resident aliens who are citizens of Syria or the Lebanese Republic on whom to confer the right to inherit property without restriction, disfavoring in this respect all other non-resident aliens.

It is perfectly proper for Mississippi to enact a law allowing non-resident aliens to inherit property in the state. That question was settled by this Court in *Blythe* v. *Hinckley,* 180 U.S. 333, 21 S. Ct. 390 (1901):

> "There has not been cited a single case where any doubt has been thrown upon the right of a state, in the absence of a treaty, to declare an alien capable of inheriting or taking property and holding the same within its borders. The treaties have always been for the purpose of enabling an alien to take even though the particular state may not have expressly permitted it. But no case has arisen where it was asserted or claimed that a state in the absence of a treaty might not itself permit an alien to take property within its limits." (21 S. Ct. 394).

Therefore, it was permissible for Mississippi to insert in its statute a provision allowing Nationals of the two selected nations to inherit property, even if no treaty existed. To strike this proviso would be to penalize the Nationals of the two favored nations and to deprive Mississippi of the unquestioned right to allow the Nationals to inherit. And we do not suggest such a course. Nor is it necessary to strike down the statute in its entirety.

Instead, the statute must be read in conjunction with the Treaty, which is the supreme law of the land. The Treaty reads itself into the state statute and voids or modifies or amends the statute as may be necessary to avoid conflict and carry out the terms of the Treaty. As was held by this Court in *Havenstein* v. *Lynham*, 100 U.S. 483, 25 L.Ed. 628 (1879):

> "It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national policy. . . ."

Since discrimination is impermissible against Nationals of treaty countries who have been promised the most constant protection and security for their property and unrestricted due process in the territory of the United States, it is necessary, and only necessary, that the provision for such protection be construed as amending the local statute, if need be, to afford to non-resident treaty Nationals at least equal rights with state favored non-resident aliens.

In other words, the Treaty, with its protective mandates, as effectively adds the Republic of Honduras to the statutory list of favored nations as if the statute had listed Honduras along with Syria and the Lebanese Republic.

This, we submit, is the minimum to be afforded by the guaranteed due process of law to Honduran Nationals. Not only this, but the equalization of rights is mandated by regard for the recognized general purpose of treaties of amity and commerce to avoid injurious discrimination. As this Court held in *Todok* v. *Union State Bank of Harvard, Nebraska*, 281 U.S. 449, 50 S. Ct. 363 (1930):

> ". . . While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection

to aliens which citizens of one or both of the parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other. . . ." (50 S. Ct. at 366).

This means of eliminating discrimination by giving effect to the Honduran Treaty as a part of the law of Mississippi does no violence to state policy. Since other non-resident aliens are allowed by statute to acquire land by inheritance, there obviously is no non-ownership policy against non-resident aliens per se. Cf. *Weinberger* v. *Wisenfeld,* 95 S. Ct. 1225 (1975).

Without offending state policy, therefore, the suggested approach would preserve the rights of those expressly state favored and serve also the general purpose of treaties of amity and commerce to avoid injurious discrimination. It is only by construing the treaty protection guarantees to extend at least this far that due process may be assured. Anything less makes a mockery of the treaty promises of the "most constant protection and security for their persons and property."

We submit that the Supreme Court of Mississippi would so construe the Treaty, rather than destroy the right granted expressly to other favored non-resident aliens. Indeed, it has not heretofore hesitated to give full acknowledgment to the force of treaties as a part of the law and policy of the state, as to which see the series of opinions of the Supreme Court in *Guiseppe* v. *Cozzani,* 118 So.2d 189 (1960); 159 So.2d 278 (1964); 193 So.2d 549 (1966), construing a treaty with Italy similar in terms to Article IV of the Honduran Treaty and holding that the Treaty Nationals of Italy, non-resident aliens, were entitled to inherit Mississippi land and to hold the land beyond the minimum three year period (25 years).[8]

Analogy may be drawn to the relief granted to citizens of foreign states under Article 4, Section 2, Clause 1, Constitution of the United States, by extending a privilege allowed expressly only to citizens of a state to apply equally in favor of citizens of sister states. See *Quong Ham Wah Co.* v. *Industrial Accident Commission,* 192 Pac. 1021, 12 A.L.R. 1190, error dism. 255 U.S. 445, 41 S. Ct. 373 (Cal. 1920). Just as Article 4 writes itself into state laws to extend the privileges granted to its own citizens to those of the several states, so, in this case, does the Treaty write itself into the law of Mississippi to require protection and equal security.

Cf. *Weinberger* v. *Wisenfeld,* 95 S. Ct. 1225 (1975), where social security survivor's benefits were extended to widowers although the Social Security Act expressly extended such benefits only to widows, reliance being placed for the decision on the equal protection aspect of the Fifth Amendment's due process requirement.

III. Treaty Construction Must Be Liberal

Viewing Article IV as if it were totally unrelated in spirit to Article I, the panel majority focused upon the provision that whenever a Honduran National was disqualified from holding land under local law

> ". . . such national shall be allowed a term of three years in which to sell the same, this term to be reason-

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[8] The majority of the panel of the Fifth Circuit argued that this case was distinguishable, but we submit that the case is directly in point. At the very least, it stands for the willingness of the Mississippi Court to give full and liberal, not grudging, recognition to treaty claims involving land and to accommodate the local law to the spirit of such treaty provisions as those here involved. The Federal Courts should certainly do no less.

> ably prolonged if circumstances render it necessary. . . ."

and held that the three year *minimum* became a *maximum* term, on the expiration of which title was lost, unless (1) an effort had been made to sell within the three years and (2) a sale within that time had been prevented by "an inability" within such term, "to satisfactorily clear title, an inability to sell for market value, wilful frustration of the effort to sell, and like events."

This was contrary to the findings of the District Court which held that circumstances, including the widow's ignorance, failure of the husband's brother to inform the widow of her inheritance and the secretly developed hostile claim by the brother in physical possession of the land, required an equitable prolongation of the term.

Our position is that the forfeiture imposed by the Fifth Circuit was not what the Treaty envisioned by the guarantees of Article I for the "most constant protection and security" for the property of Treaty Nationals and for due process and just compensation and, at best, violated the established canon applicable to treaties which requires a liberal construction in favor of Treaty claims by Nationals.

In *Factor* v. *Laubenheimer*, 290 U.S. 276, 54 S. Ct. 191 (1933), the Court followed a long line of its own decisions and announced:

> "In choosing between conflicting interpretation of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect

the apparent intention of the parties to secure equality and reciprocity between them. For what reason *if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.* Jordan v. Tashiro, 278 U.S. 123, 127, 49 S. Ct. 47, 73 L. Ed. 214; Geoffroy v. Riggs, 133 U.S. 258, 271, 10 S. Ct. 295, 33 L. Ed. 642; In re Ross, 140 U.S. 453, 475, 11 S. Ct. 897, 35 L. Ed. 581; Tucker v. Alexandroff, 183 U.S. 424, 437, 22 S. Ct. 195, 46 L. Ed. 264; Asakura v. Seattle, 265 U.S. 332, 44 S. Ct. 515, 68 L. Ed. 1041. . . ." (Emphasis added) (54 S. Ct. at 195-196).

See also: *Bacardi Corporation of America* v. *Domenech,* 311 U.S. 150, 61 S. Ct. 219 (1940), for the most recent reannouncement of the rule of construction.

Given a possible choice between constructions, this Court has frequently reannounced and consistently adhered to the canon and has always chosen the one avoiding restrictions and enlarging rights claimed under treaties. For example, see:

Havenstein v. *Lynham,* 100 U.S. 483, 25 L. Ed. 1850 (1879), construing a treaty with the Swiss Confederation allowing a National to dispose of property within the time allowed by local law. The Court held that the absence of local law on the subject did not cut off the right of the alien to hold title but that the time was unrestricted.

Asakura v. *City of Seattle,* 265 U.S. 332, 44 S. Ct. 515 (1924), construing a treaty with Japan allowing a National to carry on "trade". The Court held that "trade" included the operation of a pawn shop.

Jordan v. *Tashiro,* 278 U.S. 123, 49 S. Ct. 47 (1928), holding that leasing for "commercial" purposes to carry on a "trade, wholesale and retail," included leasing of land on which to construct a hospital.

Todok v. *Union State Bank of Harvard, Nebraska,* 281 U.S. 449, 50 S. Ct. 363 (1930), construing a Treaty with Norway allowing Nationals to "freely dispose of their goods and effects." The Court held that "goods and effects" included land and allowed for disposition without restriction.

In *DeGeoffroy* v. *Riggs,* 133 U.S. 258, 10 S. Ct. 295 (1890), the Court held that protection of property was a fitting subject for negotiation between two countries and that the removal of disabilities "to hold, transfer, and inherit property in such cases, tends to promote amicable relations. Such removal has been, within the present century, the frequent subject of treaty arrangement." (10 S. Ct. at 296-297).

The citations could be multiplied but the foregoing illustrate the pattern for liberal construction in regard to property claims. Moreover, it is said in *Sullivan* v. *Kidd,* 254 U.S. 433, 41 S. Ct. 158 (1920):

> ". . . All parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole." (41 S. Ct. at 161).

In the circumstances of the case at bar, what construction choices were presented? What is the meaning and scope of the Article IV provision that the minimum term is to be prolonged if circumstances render it necessary? Are Articles I and IV mutually exclusive or must they be read together, with each taking meaning from the other? Is the prolongation of the term in Article IV related to the guarantee of the most constant protection and security for property and to the due process requirements spelled out in Article I.

One fair construction is the one adopted by the District Court: Where a National is ignorant of her inheritance and, therefore, unaware of any necessity to sell the land, she should have a reasonable time, after actual notice is received, within which to act, especially when, as here, the land reposes in the hostile hands of one who, as a fiduciary, has some moral, if not a legal, duty to protect the widow's inheritance.

Such a construction would hardly outrage the local policy regarding the holding of land temporarily and would be consistent with the Treaty guarantees of general protection and security.

The narrow construction adopted below would place the Honduran on constructive notice for failure to inquire after her rights. The alternative construction would preserve the status quo pending actual notice. One approach is narrow and technical; the other is broader and practical. One restricts and the other enlarges claims under the Treaty. In the light of the spirit of protection inherent in treaties in general, as even more specifically expressed in Article I of the Honduran Treaty, which construction is the Court to choose?

Another construction would protect the claim here even under the restrictive conditions imposed by the decision below. This is so because the land was in the hostile physical possession of the widow's brother-in-law, and the widow was not likely to have been able to clear her title and sell the land without litigation, even if she had tried to do so within the three year minimum time.[9]

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[9] Judge Godbold in his dissent observed that the actions of Hamilton McGowan in claiming his brother's land for his own to the widow's exclusion was "too strong for the nostrils of an able and experienced trial judge. It is too strong for mine as well."

Another and broader construction would be to allow a reasonable time to sell after litigation is instigated to take away the property or after notice of an adverse claim is given. This construction would be consistent with the provision that the property would not be taken without due process of law and the payment of just compensation. It would avoid unjust forfeiture by those who remain innocently ignorant of their inheritance. It would be properly tuned to the spirit of the Treaty.

An example of this process is found in an analogy to escheat cases: A leading case in point is *Dutton* v. *Donahue,* 8 P.2d 90, 79 A.L.R. 1355 (Wyo. 1932), involving the treaty with Great Britain which has the identical language found in Article IV of the Treaty with Honduras. The facts in this case were that one Charles Bell, a naturalized citizen of the United States, died intestate seized of certain real estate in Wyoming. His heirs at law were his parents and brothers and sisters who were non-resident aliens, living in Great Britain. Death occurred in January 1919, but the heirs did nothing toward a sale of the property until November of 1928, nine years and ten months later, after which this action was filed to establish the title contracted then to be conveyed to the purchaser. In December of 1930, the plaintiffs, alien heirs, petitioned the Court for an extension of time in which to complete the sale and disposition of the property. The State of Wyoming intervened and claimed the title by escheat, asserting that non-resident aliens could not inherit under the laws of the State and that the right to sell the land had expired under the terms of the treaty with Great Britain, on which the plaintiffs relied.

Responding to contrary arguments by the State of Wyoming, claiming title by escheat, the Court held:

1. The treaty caused the title to be taken by the alien heirs, defeasible after three years.

2. The rights of the heirs in the property did not ipso facto cease upon the expiration of three years.

3. The heirs were not required to apply for an extension of time within the initial three-year period allowed by the treaty for the sale of property.

4. A sale or disposition of the property prior to commencement of escheat proceedings by the State was valid and not prohibited, without regard to the time of sale.

5. A delay of eleven years in making a judicial application for an extension of the time did not cause a forfeiture of the title in favor of a claimed escheat to the state.

IV. Payment of Just Compensation

While the Constitution, Amendment 5, provides that property shall not be taken for a "public use" without just compensation, the Treaty provides that:

> "Their property shall not be taken . . . without payment of just compensation."

No compensation has been tendered or received.

The majority panel decision below would discard this provision entirely, because the taking here was by an *individual* claiming under a state law and not by the *"government,"* i.e., not for a public use.

Whether this refinement was impressed upon the Honduran negotiators cannot be known. It certainly is not obvious from the solemn language of the Treaty itself which says nothing about a taking for a "public use;" only that the National's property shall not be taken without just compensation.

This again ties into Article IV, which says that the time to sell property shall be reasonably prolonged if circumstances render it necessary.

To "sell" implies that just compensation will be negotiated and received. If the property is not sold in the negotiated sense, it still may not be "taken" by another without just compensation. To deny this is to change Article I as it is written. The change would again add restrictive words which are not there but which, presumably, would have been there if the High Contracting Parties had so intended.

The decision below would take the property from the Hondurans and give it to Hamilton McGowan without any compensation, just or otherwise, when the Treaty says, simply, that this shall not be done.

At least, the prolongation of time in Article IV should be allowed to the extent necessary to enable the Honduran heirs to receive what the Treaty guarantees, i.e., just compensation. Any other result again adopts a narrow, restricted and even a strained construction, contrary to the settled rule of this Court.

V. Intrusion of State into Foreign Affairs to Be Avoided

Finally, the Mississippi statute, as modified by the Treaty, should receive a construction which will avoid the Constitutional infirmity inherent in local laws which, if otherwise applied, reasonably could be viewed as an intrusion by a state into the sensitive field of foreign relations entrusted exclusively to the national government.

Assuming that Mississippi could exclude *all* non-resiresident aliens from inheritance of Mississippi land and thereby avoid invidious discrimination, the statute, on its face, does not exclude all non-resident aliens. Instead, it picks and chooses two and excludes others for no other apparent reason than preference as to national origin.

The asserted right of states to pick and choose among aliens residing abroad, thereby favoring one and disfavoring another, was rejected in *Zschernig* v. *Miller*, 389 U.S. 429, 88 S. Ct. 664 (1968), wherein the Court invalidated the statute of Oregon under which favoritism in land matters was geared to reciprocity of inheritance rights afforded by the foreign country involved, saying:

> "The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. See Miller, The Corporation as a Private Government in the World Community, 46 Va.L.Rev. 1539, 1542-1549 (1960). Where those laws conflict with a treaty, they must bow to the superior federal policy. See Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922. Yet, even in absence of a treaty, a State's policy may disturb foreign relations. As we stated in Hines v. Davidowitz, supra, 312 U.S., at 64, 71 S. Ct., at 402, 'Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' " (88 S. Ct. at 671).

Instead of striking down the state statute as a whole or removing the two favored nations from its intended benefits, the statute can be reconciled with the Constitution by construing the Honduran Treaty, and those of similar import, as including a like protection for those aliens favored by the national government with guarantees of the "most constant protection and security for their property" in the territory of this country.

CONCLUSION

With deference, the Court of Appeals has misconstrued the Treaty and has set a harmful precedent and in the process, has disregarded principles of construction established by decisions of this Court and, in so doing, has cast doubt upon the policy of the United States of viewing liberally claims to property under treaties of friendship and commerce with nations around the world.

We respectfully submit that the decision of the divided panel of the Court of Appeals should be reversed and the decree of the District Court should be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX A

Dorotea Zaldivar V. De TENORIO,
Plaintiff,

v.

H. E. McGOWAN et al., Defendants.

Civ. A. No. 1608.

United States District Court,
S. D. Mississippi, E. D.

Oct. 1, 1973.

[364 F. Supp. 1051]

OPINION OF THE COURT

DAN M. RUSSELL, Jr., Chief Judge.

Dorotea Zaldivar V. De Tenorio, a non-resident alien of the United States and a citizen of the Republic of Honduras, brought this action against numerous Mississippi residents and non-residents, to confirm her title and interest in and to a 37 acre tract of land in Clarke County, Mississippi, more particularly described as:

> "All of the NW¼ of NE¼, less 3 acres in the SW¼ of NW¼ of NE¼, lying South of the Shubuta and Vossburg Road, all in Section 22, Township 1, Range 14 East, containing 37 acres, more or less, in Clark County, Mississippi,"

subject only to such outstanding oil, gas and mineral leases or royalty conveyances as may have been executed by her. Plaintiff claims that she inherited a one-half interest in said tract from her sister of the whole blood, one Maria Obdulia Zaldivar McGowan, widow and sole heir of E. J. McGowan, deceased, the record owner of said tract prior to a 1968 state court confirmation of title suit in Clarke County, filed by H. E. McGowan, a defendant herein, and who was a brother of the aforesaid E. J. McGowan, deceased.

By an order of this Court, dated June 11, 1973, amending the pre-trial order of the same date, certain parties who failed to appear or participate in the pre-trial hearing were adjudged in default and their claims were cancelled and held for naught except as to any of said parties claiming through the aforesaid H. E. McGowan, deceased, or his assigns, in the event title in this action be confirmed in H. E. McGowan. These parties are Wiley Fairchild, Hattiesburg, Mississippi, a defendant to the original complaint and to the cross-complaint of H. E. McGowan, et al; J. L. Sellers, Hattiesburg, Mississippi, a defendant to the original complaint; Cecil E. Barnett, Laurel, Mississippi, and his assignee, Robert L. Thomsen, Jackson, Mississippi, defendants to the original complaint; Hess Pipeline Company, Wilmington, Delaware, a defendant to the original complaint; and Viking Oil Company, a Mississippi corporation, First Mississippi National Bank, Hattiesburg, Mississippi, John Bethea, Hattiesburg, Mississippi, and Anselmo Zaldivar, Hilario Zaldivar, Felipe Murillo Zaldivar, Adela Zaldivar, and Victor Zaldivar all of Puerto Cortes, Honduras, defendants to the cross-complaint of H. E. McGowan, et al.

The Court finds it unnecessary to detail in this opinion a recitation of all the various and numerous pleadings inasmuch as the aforesaid pre-trial order, as amended, succinctly and accurately reflects the alignment of the parties, the admitted matters and facts, pertinent documents, and the factual matters and legal issues in dispute. The trial of the case, heard to the Court, was confined to the matters set out in the pre-trial order and the pleadings made pursuant thereto.

In the pre-trial order, it was admitted that all jurisdictional questions were resolved as a result of an opinion dated November 10, 1971 and order rendered thereon wherein the Court found that it had jurisdiction under 28 U.S.C. § 1331, this action involving a construction of a treaty of the United States.

FACTS ESTABLISHED IN THE PRE-TRIAL ORDER

The 37 acre tract of land in Clarke County, Mississippi, described above, was patented by the United States of America to one Marmaduke Gardner in 1841 and by mesne conveyances became vested in E. J. McGowan, then of Clarke County, who acquired same as grantee in two warranty deeds, namely: a deed from T. J. Evans dated November 17, 1911, recorded in Deed Book I-1 at page 197, conveying the N½ of NW¼ of NE¼, and the SW¼ of NW¼ of NE¼, less 3 acres, in Section 22, T 1, R 14 E, containing 27 acres, more or less; and a deed from J. W. McGowan dated December 15, 1915, recorded in Deed Book I-1 at Page 196, conveying the SE¼ of NW¼ of NE¼, in the same section, township and range, containing 10 acres, more or less, both of said deeds being filed for record on December 20, 1915, and recorded thereafter in the deed records of the Chancery Clerk of Clarke County. Copies of these deeds are exhibits herein.

About 1911, E. J. (Elbert John) McGowan went to Central America where he thereafter resided and worked in various Central American countries, including Panama and Honduras. He was lawfully married to Maria Obdulia Zaldivar, born in Honduras of Honduran parents. This marriage continued until the death of E. J. McGowan. There were no children born of this marriage. E. J. McGowan and his wife took into their home and reared a child, Elsie Reina McGowan,[1] who was not their natural child, nor legally adopted by them, nor an heir at law of either E. J. McGowan or his wife. E. J. McGowan died intestate in the Republic of Panama on October 31, 1957, leaving as his sole heir at law, his wife, Maria Obdulia Zaldivar McGowan. She died intestate in the Republic of Honduras on February 28, 1969, without having remarried and without a child having been born to her and without having legally adopted a child. She was survived by one sister and one brother of the whole blood, namely a sister, Dorotea Zaldivar V. De Tenorio, plaintiff herein, and one brother, Felipe Murillo Zaldivar.[2] There were no other surviving brothers or sisters of the whole blood, or descendants of a brother or sister of the whole blood. The remaining brothers and sisters, viz:, Anselmo Zaldivar, Hilario Zaldivar, Adela Zaldivar and Victor Zaldivar, are of the half-blood, were named as defendants in the cross-complaint of H. E. McGowan, and have defaulted herein. Neither parent of Maria Obdulia Zaldivar McGowan survived her death. Nor did Maria Obdulia Zaldivar McGowan, widow of E. J. McGowan, ever renounce her Honduran citizenship. Although she resided in various localities with her husband, E. J. McGowan, a citizen of the United States, she remained a citizen of Honduras and died there.

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[1] Elbert John McGowan, James Patrick McGowan and Louis Harold McGowan, minor children of Elsie Reina McGowan, deceased, by their legal guardian, Peter K. Smith, were named defendants in the original suit, answered, cross-claimed and challenged plaintiff's original claim to the entire fee, basing their claim to an interest in the realty through their mother, now deceased, as an allegedly acknowledged daughter of E. J. McGowan. They have abandoned this claim and claim an undivided one-half interest in the realty, subject to mineral leases and royalties, by virtue of a quit claim deed from Felipe Murillo Zaldivar, brother of the whole blood of Maria Obdulia Zaldivar McGowan, the common source of plaintiff's claim.

[2] See footnote No. 1.

After the death of E. J. McGowan, his brother, H. E. McGowan, received an official "Report of the Death of an American Citizen" from the Consul, American Foreign Service Panama. This report was produced on plaintiff's request and filed as an Exhibit herein.

Neither H. E. McGowan nor any member of the McGowan family communicated with Maria Obdulia Zaldivar McGowan upon or after the death of E. J. McGowan, or undertook to advise her concerning the estate of E. J. McGowan located in the United States. As stated above, Maria Obdulia Zaldivar McGowan, died intestate in Honduras on February 28, 1969, leaving as her sole heirs at law, a sister, plaintiff, Dorotea Zaldivar V. De Tenorio, and a brother, Felipe Murillo Zaldivar.

On August 14, 1968, prior to the death of the widow of E. J. McGowan, defendant, H. E. McGowan filed in the Chancery Court of Clarke County, Mississippi, a confirmation suit, No. 7852 on the docket of that court, against his brothers and sisters, the widow of a deceased brother residing in Mississippi, and against "the unknown heirs, if any, of E. J. McGowan, deceased." A final decree was entered on October 22, 1968, vesting the fee title in H. E. McGowan, but no attempt was made to serve process or give notice to Maria Obdulia Zaldivar McGowan, then residing in Honduras. Copies of all pleadings in this suit are exhibits herein.

The Treaty of Friendship, Commerce and Consular Rights existing between the United States and the Republic of Honduras, a copy of which is an exhibit herein, was in effect during all relevant periods of time.

Plaintiff Dorotea Zaldivar V. De Tenorio has executed oil, gas and mineral leases to W. Baldwin Lloyd, brought into the case by cross-claims filed by some of the original defendants. His factual claims coincide with those of his lessor, the plaintiff, Dorotea Zaldivar V. De Tenorio, and are applicable to the one-half interest she claims in the realty, subject to the reservation therein of a royalty interest. These leases are recorded in Book OGL 66 at page 238 and in Book OGL 67 at page 237 in Clarke County and copies are exhibits herein. Felipe Murillo Zaldivar executed a deed covering his interest in the realty to Elbert John McGowan, James Patrick McGowan and Louis Harold McGowan, wards of Peter K. Smith, guardian of their estates, who, in turn, has executed oil, gas and mineral leases to Corsair Petroleum Corporation recorded in Book OGL 66 at pages 425, 427 and 429, retaining a royalty interest. These instruments, or certified copies, are exhibits herein.

Since the filing of the original complaint, Inexco Oil Company, a defendant herein, has drilled an oil well on a production unit including the 37 acre tract. Amoco Production Company, a defendant, is the operator of the well. The purchaser of the oil production is Miller Oil Purchasing Company, and the purchaser of the gas production is Tonkawa Gas Purchasing Company.

PLEADINGS AND OTHER EVIDENCE

As a part of the pre-trial order plaintiff agreed to amend her complaint to reduce her claim to a one-half interest in the 37 acre tract, subject to the lease executed by her to W. Baldwin Lloyd, her title having been derived by inheritance through her sister, Maria Obdulia Zaldivar McGowan, who was survived by two and only two heirs, namely, the plaintiff, sister of the whole blood, and Felipe Murillo Zaldivar, brother of the whole blood. Plaintiff agreed to further amend her complaint to allege that since the initiation of this suit, a well has been drilled on an 80 acre unit which includes the land in controversy; that the well is now and has for some time been producing oil and gas; that the well was drilled by defendant, Inexco Oil Company, but is now being operated by the defendant, Amoco Production Company, who is selling the oil and gas production, and that plaintiff is entitled to a full accounting and to a judgment for the proceeds accruing to her interest in the oil and gas produced and sold from said producing well and to the appointment of a Receiver to receive and invest the said proceeds pending termination of this litigation.

W. Baldwin Lloyd, holding a 7/8ths leasehold interest under leases from the plaintiff, Dorotea Zaldivar V. De Tenorio, agreed to amend his pleadings in line with the claim of his lessor.

Peter K. Smith, Guardian; Corsair Petroleum Corporation; Paul M. Neville, individually and as trustee; W. C. Falkenheimer, J. Logan Sewell, James F. Conn, and Alice B. Scroggins agreed to amend their pleadings to concede that a one-half interest was cast by inheritance upon Dorotea Zaldivar V. De Tenorio and to allege that the remaining one-half interest was cast by inheritance upon Felipe Murillo Zaldivar, who conveyed to the aforesaid wards of Peter K. Smith, guardian, through whom the remaining parties, next listed above, claim their titles and interests. The guardian and these parties also demand a full accounting and a judgment for the proceeds of oil production accruing to their interests.

These amendments have been made, and responses have been duly filed by the following defendants and cross-plaintiffs: H. E. McGowan, Hazel Draughon McGowan, Charles B. McGowan, Louise McGowan Hannah, M. M. McGowan, B. C. Burns, Sr., H. D. Burns, Sr., Blanche W. White, Inexco Oil Company, Pan American Petroleum Corporation, Amoco Production Company, Love Petroleum Company, James M. White and T. Carleton Billups.

All parties to the pre-trial order agreed that all exhibits introduced by the plaintiff and Peter K. Smith, would be applicable to the case for the plaintiff, Dorotea Zaldivar V. De Tenorio; cross-defendant, W. Baldwin Lloyd; and defendants, Peter K. Smith, Guardian of Elbert John McGowan, James Patrick McGowan, and Louis Harold McGowan; Corsair Petroleum Corporation; Paul M. Neville, individually and as trustee; W. C. Falkenheimer, J. Logan Sewall, James F. Conn and Alice B. Scoggins.

The parties agreed that all exhibits introduced by defendant, H. E. McGowan, would be applicable to his case and also to other defendants, namely, Hazel Draughon McGowan; Charles B. McGowan; Louise McGowan Hannah; M. M. McGowan; B. C. Burns, Sr.; H. D. Burns, Sr.; Blanche N. White; Inexco Oil Company; Pan American Petroleum Corporation; Amoco Production Company; Love Petroleum Company; James W. White; and T. Carleton Billups.

Plaintiff, Dorotea Zaldivar V. De Tenorio, appeared and testified. She spoke no English and testified through a Spanish interpreter. She stated that she was born in 1905 in the Republic of Honduras and has remained a Honduran citizen. Her parents, Phillipe Murillo and Perfecta Zaldivar died many years ago. She went to school through the fifth grade in the small town of Trisagio, close to Puerto Cortes, Honduras. Obdulia was her older sister by two years and died in 1969 in Puerto Cortes. She and Obdulia lived together for many years both before and after the death of E. J. McGowan. The witness first met E. J. McGowan in Guanchia, Honduras, prior to his marriage to Obdulia. The witness often visited them by train. She stated that E. J. McGowan married her sister in 1940 in Costa Rica. Obdulia was then 37 years of age. After E. J.'s death in Panama, Obdulia returned to Honduras and lived with the witness until her death. During this time the sisters saw and talked with each other every day. They knew nothing of the United States or E. J.'s life in the State of Mississippi, or that he owned property there. Obdulia spoke very little English. She and her husband conversed in Spanish which he spoke very well. The witness said she never heard them discuss with each other his property in Mississippi. Nor did she or her sister know anything of the treaty between the United States and Honduras. On cross-examination, the witness said she first learned of her interest in the tract involved herein about four years prior to the trial date, being about two years after her sister's death, when she was visited by some people from the United States. She had a snapshot in her purse, and identified it with a man in the courtroom whose name she did not know. She also identified her brother, Felipe Murillo Zaldivar, in the picture, and stated that he is now residing in Guatemala. She recognized her signature on the oil and gas leases which she executed in favor of W. Baldwin Lloyd, and said that her Louisiana attorney, an Honduran, interpreted and explained the leases to her.

As agreed in the pre-trial order filed in this cause, plaintiff introduced as exhibits certified copies of the following: (1) United States Patent No. 470 from the United States of America to Marmaduke Gardner; (2) warranty deed from T. J. Evans to E. J. McGowan; (3) warranty deed from J. W. McGowan to E. J. McGowan; (4) deed of trust signed by E. J. McGowan, H. E. McGowan and J. W. McGowan, dated December 18, 1915, in which E. J. McGowan was recognized as the owner of the tract involved herein; (5) a mineral lease to J. E. Toney, Trustee, dated December 26, 1939, a purportedly signed by E. J. McGowan; (6) "Report of the Death of an American Citizen," reflecting that a copy was sent to Obdulia McGowan, Calle 5, Casa 6226, Juan Diaz, Panama, as wife of the deceased, and to H. E. McGowan, Vosburg, Mississippi, brother of the deceased; (7) original Passports—E. J. McGowan, U.S.A. No. 452298-1927 and U.S.A. No. 1061-1945; (8) original Passport—Obdulia C. de McGowan, Honduras, No. 12980-1951; (9) an original Oil, Gas and Mineral Lease, dated February 1, 1971, from Dorotea Zaldivar V. De Tenorio to W. Baldwin Lloyd; (10) an original Oil, Gas and Mineral Lease, dated March 20, 1971, from Dorotea Zaldivar V. De Tenorio to W. Baldwin Lloyd; (11) Treaty Between the United States and Honduras; (12) Tax Assessment and Tax Receipt Information from 1909 through 1971 pertaining to the 37 acre tract; (13) Specimen tax receipts pertaining to the 37 acre tract; (14) Intestate succession proceedings of John Elbert McGowan, in Spanish with an English translation; (15) that part of the complaint in H. E. McGowan v. Charles B. McGowan, et al., No. 7852 on the docket of the Chancery Court of Clarke County, Mississippi, deemed by plaintiffs to be an admission against interests. Defendants, having objected to the admission of a portion of the complaint, were allowed to introduce the entire record in said cause.

By agreement of the parties, Peter K. Smith, guardian, was permitted to introduce as exhibits certified copies of the following: (1) Decree Appointing Guardian in

Cause Nos. 8315, 8316, and 8317, respectively, as docketed in the Chancery Court of Clarke County, Mississippi; (2) Decree Authorizing Guardian to Execute Oil, Gas and Mineral Lease in each of the above numbered cases; (3) an Oil, Gas and Mineral Lease, dated February 16, 1971, by Peter K. Smith on behalf of each minor ward, to Corsair Petroleum Corporation; (4) Assignment of Overriding Royalty Interest, dated February 25, 1971, by Corsair Petroleum Corporation, to Paul M. Neville; (5) Assignment of Overriding Royalty Interest, dated April 13, 1971, by Corsair Petroleum Corporation to W. C. Falkenheimer; (6) Assignment of Overriding Royalty Interest, dated February 22, 1971, by Corsair Petroleum Corporation to J. Logan Sewell; (7) Assignment of Overriding Royalty Interest, dated June 8, 1971, by Corsair Petroleum Corporation to James E. Conn; (8) Assignment of Overriding Royalty Interest, dated July 13, 1971, by Corsair Petroleum Corporation to Alice B. Scroggins; and (9) a quit claim deed dated May 3, 1971, from Felipe Murillo Zaldivar to Elbert John McGowan, James Patrick McGowan and Louis Harold McGowan.

At the conclusion of plaintiffs' case, the defendants' moved to exclude the evidence and direct a verdict for the defendants on the grounds that plaintiffs failed to prove that the treaty between the United States and Honduras should be construed favorably to the non-resident alien plaintiff, and that plaintiffs had failed to overcome the affirmative defenses of the defendant contending that H. E. McGowan acquired the fee simple title to the 37 acre tract involved by virtue of the Clarke County confirmation of title suit based on more than ten years' adverse possession. The Court overruled the motion.

Defendants introduced into evidence certified copies of (1) a Panamanian Certificate pertaining to the Succession of Elbert John McGowan, Intestate, together with an English translation, for the purpose of showing that the Mississippi property was not included in the deceased's estate; (2) an assignment, signed by J. D. Haynes, C. B. Brashier, H. E. McGowan, W. L. Bounds, and J. E. Toney, Sr., Trustee, on September 10, 1941, assigning "various gas and oil leases covering certain acreage owned by divers persons in Clarke County" to J. E. Toney, Sr.; and (3) the entire court file in H. E. McGowan v. Charles B. McGowan, et al., No. 7852, in the Chancery Court of Clarke County, Mississippi. Defendants also introduced into evidence, without objection, the depositions of Henry Ernest Culbreth, W. B. Holland, C. L. Sanders and Hayden Henson, long-time neighbors and friends of defendant, H. E. McGowan, who testified as to H. E. McGowan's management of the McGowan properties. Defendants offered into evidence the deposition of Judge M. M. McGowan, brother of H. E. McGowan, defendant. The deposition was objected to by plaintiffs and was marked for identification only, the objection being that M. M. McGowan was incompetent to testify against the interests of either E. J. McGowan, deceased, or Maria Obdulia Zaldivar McGowan, deceased, under Section 1690 of the Mississippi Code, commonly referred to as the "dead man's statute." M. M. McGowan has filed a disclaimer in this action avowing that he has no claim or interest in the 37 acre tract.

Defendants' only live witness was Mrs. C. L. Lightsey, daughter of defendant H. E. McGowan. She stated that he was ill at the time of the trial and unable to testify. Until her marriage, she lived with her parents, defendant H. E. McGowan and wife, on their Vosburg, Mississippi, farm, formerly owned by her grandfather, J. W. McGowan. She knew and was familiar with H. E. McGowan's brothers and sisters, except for E. J. McGowan, whom she saw one time in her life when he visited the Mississippi farm for a short time in 1936 on the death of J. W. McGowan. She is familiar with the land involved in this suit saying it was a quarter of a mile from her father's home. She stated her father, for many years, had claimed this land and farmed it, and that, when E. J. McGowan left Mississippi in 1936, he told her father he would never be back. She stated that he did not return, and her first knowledge of him thereafter was when her father received the notice of his death from the American Consulate in Panama. As to a mineral lease, introduced into evidence as Plaintiffs' Exhibit 5, to J. E. Toney, Trustee, dated December 26, 1939, purportedly signed by E. J. McGowan, witnessed by H. E. McGowan and one G. W. Mason, and acknowledged before the Chancery Clerk of Clarke County, she stated that E. J. McGowan was not in Mississippi in 1939.[3] She did acknowledge that her father bought and sold oil leases for as long as she could remember, and had worked up a block of leases for Mr. Toney for which her father was paid ten cents an acre. The witness stated that for twenty years she had handled the payment of taxes for her father on his farm properties, including the two separate pieces composing the 37 acre tract. She admitted that the 27 acres acquired by E. J. McGowan from T. J. Evans in 1911 was assessed to E. J. McGowan in 1913, and continued to be assessed to E. J. McGowan until 1958, when it was assessed to E. J. McGowan Estate, and that in 1969 the assessment was changed to H. E. McGowan, her father, as the result of the state court confirmation suit. Although Plaintiffs' Exhibit 12, being a list of these assessments, reflects that the assessed owner paid the taxes, the witness said that the taxes had actually been paid by her father, and that in 1957 or 1958, she personally requested the Sheriff to change the assessment to her father. He refused. The remaining 10 acres, which E. J. McGowan acquired from his father, J. W. McGowan, are shown by Plaintiffs' Exhibit 12 to have been assessed to E. J. McGowan from 1913 to 1918; from 1921 to 1941 assessed to J. W. McGowan; and from 1942 to 1971 assessed to J. W. McGowan Estate. The exhibit does not reflect that this assessment has ever been changed to H. E. McGowan. It does reflect that the taxes in 1957 and 1958 and from 1964 to 1971 have been paid by H. E. McGowan, which the witness said she paid in her father's name. On cross-examination, the witness stated that from the time of the death of her grandfather, J. W. McGowan, in 1936, her father, H. E. McGowan, has managed the family properties, including his own property, the home place which he acquired from J. W. McGowan, and including the 37 acres owned by E. J. McGowan; that her father farmed on the land through tenants and treated all as one farm unit. She admitted that her father had never remunerated any moneys to E. J. McGowan for the use of the 37 acres, but that neither had E. J. McGowan ever paid a dime on the taxes.

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[3] By stipulation, the parties agreed that at the time this lease was recorded, the Chancery Clerk's office had no photostatic equipment, and that all handwriting in an instrument for recordation was in the handwriting of the Clerk.

The four neighbors of H. E. McGowan, whose depositions were taken by the defendants, testified generally that each had known the McGowan family for many years; that E. J. McGowan, after going to Central America in 1911, had returned to the United States, no more than twice, the last time being in 1936 when his father died; that H. E. McGowan had farmed all the McGowan properties as one unit, including the 37 acre tract involved herein, and had maintained same under fence. They were not familiar with the record title, nor the manner in which the taxes were assessed or paid.

CONCLUSIONS

There are three basic issues in this case. Plaintiffs contend (1) that E. J. McGowan's title was not lost by the claimed adverse possession of H. E. McGowan; (2) that, in the absence of state court process to E. J. McGowan's widow, her heirs are not barred by the state court condemnation suit; and (3) a liberal interpretation of the Treaty between the United States and the Republic of Honduras does not require a forfeiture of the widow's interest by her failure to sell her interest prior to her death in 1969. The defendants contest each of these assertions, and, in their pleadings, additionally asserted a parol gift of the property from E. J. McGowan to H. E. McGowan in 1936 and claimed that the non-resident aliens are precluded from acquiring title to land in Mississippi by state statute. As to the latter claim, this Court, in an opinion by Judge Walter L. Nixon, Jr., dated November 10, 1971, pointed out that treaty provisions which would produce different or conflicting results will prevail over local or state law. As to the claim of a parol gift, this Court finds that defendant, H. E. McGowan, wholly failed to overcome the burden of establishing such a gift by clear and convincing proof, much less by judicial determination until his confirmation suit. Aside from such allegation in his state court confirmation suit, this record is silent as to any evidence of such a gift. To the contrary, the signature of E. J. McGowan, witnessed by H. E. McGowan, on the 1939 mineral lease to J. E. Toney, Trustee, whether genuine or a forgery, belies the claim that the property was then owned by H. E. McGowan under any kind of title.

In his state court confirmation suit, H. E. McGowan averred, in part as follows:

"Your Complainant would show that since the purchase of the land by the said E. J. McGowan from his uncle, T. J. Evans, in 1911 that he, your Complainant, has had the exclusive control, use, occupation and management of the said land. That he farmed it each and every year, and never at any time attorned to his brother or paid him anything for the use thereof; neither was the same expected or required of him.

Complainant further says that he paid all ad valorem taxes upon the land and has paid the same since his brother purchased the land in 1911 when he was away from home working on the Panama Canal, as aforesaid. Thus, for fifty-seven years between 1911 and this date Complainant has paid all the taxes and had exclusive use of the same, farming, tilling or renting the same out for the purpose of farming and tilling at all times. However, Complainant admits that he was, between 1911 and 1936, performing all of these duties without claiming title to the land as a favor to his brother and for the use of the said lands.

Complainant would show that since the year 1936, a period of thirty-two years heretofore, he has been in the actual, exclusive, continuous, uninterrupted, adverse possession of said lands, claiming the same as his own, and each year keeping the land fenced and either farming it himself or through tenants, all of whom attorned to him, your Complainant. Your Complainant therefore claims and owns the land as his very own and has, as aforesaid, been in the open, notorious, continuous, exclusive, uninterrupted and hostile possession thereof as against the said E. J. McGowan or any unknown heirs who might claim through him."

The testimony and admissions of facts received in this case show conclusively that H. E. McGowan's management of the E. J. McGowan property was in the same manner as he managed his own from 1911 to 1968, the date of the confirmation suit. Nothing occurred to change his fiduciary relationship to his brother until possibly the death of his brother in 1957 when, as H. E. McGowan alleged in his state court suit, he believed that his brother was not lawfully married despite having received consular notice of his brother's death with the widow's name and address appearing thereon. Certainly when one enters into possession of land with the permissive agreement of the record owner, the presumption is that the possession continues to be permissive and not hostile. Adverse possession entirely excludes the idea of a holding under the true owner. It is elementary that adverse possession cannot be permissive. Conversely, permissive possession cannot be adverse. As stated above, there is nothing in this record to change the admission of H. E. McGowan's permissive use and possession up to 1936 to that of adverse and hostile at least until 1957 when he received notice of his brother's death, if then. The possession necessary must be actual, open, adverse and hostile, as well as inconsistent with the existence of title in another. See 3 Am.Jur.2d, "Adverse Possession", Sec. 3, p. 83. See also Sec. 49, Ibid, wherein it is stated that permissive occupation of a family estate by one of the family is so usual, that acts of occupation thereof to show hostile possession as to strangers are not sufficient as to relatives, and in Sec. 147, Ibid, wherein it is stated that the existence of a family relationship between the parties will prevent or rebut a presumption of adverse holding.

As to plaintiffs' second claim, they contend that the default decree taken in H. E. McGowan's confirmation suit filed in 1968 based on a claim of adverse possession from 1936, the year E. J. McGowan returned to Central America, up to the time the suit was filed, was ineffective as to Maria Obdulia Zaldivar McGowan for lack of due process of law guaranteed by the Fifth and Fourteenth Amendments, citing, among other cases Robinson v. Hanrahan, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47. This Court agrees. Other than process had on named defendants, with their addresses given, which did not include Maria Obdulia McGowan, the remaining process was had by publication only, addressed to: "The unknown heirs, devisees and executors, if any, of E. J. McGowan, deceased, whose where abouts, places of residence, and post office addresses are unknown." This publication appeared once a week for three consecutive weeks in The Clarke County Tribune, a newspaper published in the town of Quitman, Clarke County, Mississippi. In Magnolia Textiles v. Gillis, 206 Miss. 797, 41 So.2d 6, the Mississippi Supreme Court cited with approval the general rule that all persons who are materially interested in the event or subject matter, without whom no effective judgment or decree can be rendered, should be made parties in a suit to quiet title, and quoted from Griffith's Mississippi Chancery Practice, Sec. 115 thusly: "In suits to cancel clouds the complainant . . . may proceed against those of his own choosing, subject to the requirement, of course, that when he chooses to attack a particular cloud or claim of title he should join all those interested in that specific and particular claim . . .". In Warren v. Clark, 230 Miss. 873, 94 So.2d 323, the Court reversed a lower court's decision for the complainant where the complainant failed to deraign title from a common source to necessary parties *and did not allege that he had joined all parties interested in the land so far as they were known to him and could be ascertained by diligent inquiry, and where owners of one of the tracts* *involved purchased from a common source and had not been made parties to the suit.* It is unfortunate here that H. E. McGowan believed his brother to be unmarried, and, although he had been informed of the widow's name and Panama address, made no effort to locate her, or have process directed to her by name at her last known address. On the basis of the above stated facts and law, this Court finds that Maria Obdulia Zaldivar McGowan, living at the time of this suit and decree entered therein, was deprived of her right to due process and that the confirmation suit decree was ineffective as to her and her legal heirs. This finding and conclusion is based, of course, on the further finding that their rights were not cut off by the hereinafter discussed treaty.

Article I of the Treaty between the United States and Honduras contains in part the following:

> "The nationals of each High Contracting Party *shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.*
>
> "The nationals of each High Contracting Party *shall receive* within the territories of the other, upon submitting to conditions imposed upon its nationals, *the most constant protection and security for their persons and property,* and shall enjoy in this respect that degree of protection that is required by international law. *Their property shall not be taken without due process of law and without payment of just compensation.* (Emphasis Added)."

Plaintiff relies heavily on a liberal construction of the emphasized portions as well as the emphasized portion of Article IV which is as follows:

> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, *such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary. . . .*" (Emphasis Added).

Section 842 of the Mississippi Code of 1942 holds in part that non-resident aliens shall not hereafter acquire or hold land, and that all land held or acquired contrary to the statute shall escheat to the state. Aside from the statute, it is clear that under the common law of Mississippi a non-resident alien could not *inherit* lands from a resident citizen. See Scottish American Mortgage Co. v. Butler, 99 Miss. 56, 54 So. 666. An alien could take title by grant or devise, but not by descent. The statute further limits the rights of aliens, providing that they cannot acquire lands by any means, such as purchase or grant. Two exceptions to the statute for the benefit of aliens who are citizens of Syria or the Lebanese Republic are not involved herein. It is also clear that where there is a conflict between a treaty and the provisions of a state constitution or of a state statute, the treaty controls. As well as its statutes, the provisions of the common law of the state may be suspended during the existence of a treaty inconsistent therewith. See 52 Am.Jur., "Treaties", Sec. 18, p. 816. Also see Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, which considered language in a treaty with Germany identical to that here with Honduras. Also in 52 Am.Jur., "Treaties", Sec. 22, p. 819 it is said that while in force treaties are the supreme law of the land for like statutes so they are declared by the United States Constitution. "They are to be executed in the utmost good faith, with a view to making effective the purposes of the contracting parties." Ibid, at page 823, it is further said: "In the solemn treaties between nations it never can be presumed that either state intends to provide the means of perpetrating or protecting frauds, but all privisions are to be construed as intended to be applied to bona fide transactions. Treaties should be so construed as to uphold the sanctity of public faith." And again in the same authority, at page 825: "Liberality is one of the foremost of the rules of treaty interpretation. Indeed, treaties are construed more liberally than private agreements. It is the general rule of construction with respect to treaties that they shall be liberally construed so as to carry out the intention and purpose of the parties. Accordingly, where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."

It is clear under the treaty involved herein that Maria Obdulia Zaldivar McGowan had the right to acquire realty in Mississippi by inheritance, notwithstanding the common law and statute of Mississippi to the contrary. It is not so clear that her next of kin were entitled to acquire this same inheritance when she died intestate. As to this point, in the absence of specific language in the treaty providing for this eventuality, the Court is inclined to construe the treaty liberally and hold that such heirs are entitled to the same protection under the treaty as their deceased kinswoman would have had. Nor does this Court have much judicial precedent to aid in determining under what circumstances the three year period for selling the property should be reasonably prolonged. The Court has, however, carefully weighed all of the circumstances and finds that the interest of E. J. McGowan's widow could not be divested from her in the absence of due process of law and without just compensation, both of which are guaranteed by the treaty. Otherwise is to declare a forfeiture which is not favored in law. Maria Obdulia Zaldivar McGowan had no knowledge of the provisions of the treaty or any knowledge of her inheritance or the attempted divestiture. Similarly, her heirs, plaintiff and Felipe Murillo Zaldivar, had no knowledge. Until they were made aware of their interest, the circumstances were such as to require a prolongation of the three year period in which to divest themselves of their inherited interests. The brother, Felipe Murillo Zaldivar, has within a necessarily prolonged term divested himself in favor of the minor wards of Peter K. Smith, at one time in this action alleged to be the grandsons of E. J. McGowan. The named plaintiff, Dorotea Zaldivar V. De Tenorio, filed this suit within a reasonable time of her knowledge.

The Court therefore finds that the named plaintiff, a resident citizen of Puerto Cortes, Honduras, is entitled to a one-half undivided interest in and to the 37 acre tract of land, more particularly described in the early part of this opinion, subject to mineral leases executed in favor of W. Baldwin Lloyd, as recorded in the records of the Chancery Clerk of Clarke County, Mississippi; and that the minor grantees of Felipe Murillo Zaldivar, wards of Peter K. Smith, Guardian, are entitled to and vested with the remaining one-half interest, subject to mineral leases they have conveyed, also of record in Clarke County.

The Court reserves for a later hearing the matter of an accounting of funds due the respective holders of oil and gas leases and royalty interests, and for further relief.

An appropriate order may be submitted, costs of court to be taxed equally between the two groups of opposing parties. The order may further provide, in the event of appeal, that this opinion and the order rendered thereon are final for purposes of appeal, further conditioned upon the giving of a suitable supersedeas bond by the appealing party or parties.

APPENDIX B

Dorotea Zaldivar V. DE TENORIO,
Plaintiff-Appellee,

v.

H. E. McGOWAN et al.,
Defendants-Appellants.

No. 74-1082.

United States Court of Appeals,
Fifth Circuit.

March 19, 1975.

Citizen of Republic of Honduras brought action against Mississippi residents to confirm title and interest in 37 acres of land in Mississippi which she allegedly had inherited from her deceased sister, who in turn allegedly had inherited from her deceased husband, a United States citizen. The United States District Court for the Southern District of Mississippi, Dan M. Russell, Jr., Chief Judge, rendered judgment for the Honduran citizen, 364 F.Supp.

1051, and defendants appealed. The Court of Appeals, Coleman, Circuit Judge, held that under the 1928 treaty with Honduras, where the Honduran widow of the United States citizen property owner had failed to sell the inherited property within three years of husband's death, she had been represented by counsel during closing of her husband's affairs and, for 12 years after husband's death, she made no inquiry nor took any action to sell land, widow was deprived of any interest in the land; and that where defendant, who was widow's husband's brother, did not know of existence of widow until husband's death, and after husband's death, widow was vested with title to land which her husband had formerly owned with sole power of disposition, subject to defeasance only in event of her failure to comply with terms of treaty, and defendant's interest was a vested remainder in the land, the interest of widow and defendant were mutually hostile, and thus defendant had no fiduciary duty to notify widow of her obligation to sell property within three years or lose her interest, particularly where defendant had no knowledge of treaty provisions.

Reversed and remanded.

Godbold, Circuit Judge, dissented and filed opinion.

1. Treaties (Key) 11

State statutory provision yields to any applicable provision of any valid treaty of United States with foreign country, since treaties constitute part of supreme law of the land. U.S.C.A.Const. art. 6, cl. 2.

2. Treaties (Key) 8

Provision of 1928 Treaty with Honduras that property of citizens of signatory should not be taken by other signatory without due process of law and without payment of just compensation refers to takings by respective signators from citizens of the other, and does not deprive courts of signators of jurisdiction to adjudicate property rights within their respective territories. Treaty with Honduras, art. 1, 45 Stat. 2618.

3. Constitutional Law (Key) 278(1)

Under 1928 Treaty with Honduras, where Honduran widow of United States citizen who owned property in Mississippi had failed to sell inherited property within three years of husband's death, fact that Treaty would operate to deprive widow of interest in property absent showing of circumstances making it necessary to extend time for sale did not deprive widow of due process. Treaty with Honduras, art. 1, 45 Stat. 2618; U.S.C.A.Const. Amends. 5, 14.

4. Treaties (Key) 8

"Circumstances rendering the action unnecessary," in purview of provision of 1928 Treaty with Honduras whereby citizen of signatory who inherits real or other immovable property in other signatory has term of three years in which to sell property unless circumstances render it necessary to prolong term for reasonable period, means circumstances existing during three-year period, such as inability to satisfactorily clear title, inability to sell for fair market value, willful frustration of effort to sell, or like events. Treaty with Honduras, art. 4, 45 Stat. 2618.

5. Records (Key) 19

Under Mississippi law, once deed of conveyance is lodged with proper officer for pubiic record in county where land is located, it is from that moment constructive notice to the world.

6. Treaties (Key) 8

Under 1928 Treaty with Honduras, where Honduran widow of United States citizen who owned property in Mississippi had failed to sell inherited property within three years of husband's death, she had been represented by counsel during closing of her husband's affairs in Honduras, and, in 12-year period from husband's death to her own death, widow made no inquiry nor took any action to sell land, there were no circumstances necessitating prolongation of the three-year period and widow, after the three years, had no interest in the land. Treaty with Honduras, art. 4, 45 Stat. 2618.

7. Trusts (Key) 102(1)

Where, by operation of 1928 Treaty with Honduras, Honduran widow of United States citizen who owned property in Mississippi was vested with title to land which her husband had formerly owned with sole power of disposition subject to defeasance only in event of her failure to sell land within three years, and husband's brother, a Mississippi resident, had vested remainder, brother did not know of existence of widow until husband's death, and brother had no knowledge of provisions of Treaty, brother had no fiduciary duty to widow to advise her as to the existence of the land or the provisions of Treaty. Treaty with Honduras, art. 4, 45 Stat. 2618.

8. Trusts (Key) 30½(2)

Where brother of Mississippi landowner who moved to Central America had used land for some 20 years with landowner's permission, use did not create trust for benefit of landowner's widow who inherited land from landowner, but who, under 1928 Treaty with Honduras, lost interest in property by failing to sell it within three years of landowner's death. Treaty with Honduras, art. 4, 45 Stat. 2618.

9. Landlord and Tenant (Key) 118(1), 119(1)

Where brother of Mississippi landowner who moved to Central America used land uninterruptedly for some 20 years without objection by landowner, and brother acknowledged landowner's ownership of land in number of ways, including, failing to ask that tax assessment be changed to him as owner, and subscribing as witness to oil and gas lease purportedly executed by landowner, brother was mere tenant at will or sufferance.

10. Aliens (Key) 9

Under Mississippi law, real property could not be inherited by Central American aliens. Code Miss.1942, § 842.

11. Constitutional Law (Key) 210

Resident aliens who are lawfully in United States are entitled to equal protection of the law. U.S.C.A.Const. Amend. 14.

12. Constitutional Law (Key) 210

Fourteenth Amendment has no application to aliens not within jurisdiction of United States. U.S.C.A.Const. Amend. 14.

13. Descent and Distribution (Key) 8
Escheat (Key) 3

Under Mississippi law, where Honduran widow of United States citizen who owned property in Mississippi failed to sell inherited property within three years of husband's death, and thereby lost interest in property by operation of 1928 Treaty with Honduras, property passed to nearest nonalien heir and did not escheat to state. Code Miss.1972, §§ 89-1-23, 89-11-1, 91-1-3; Treaty with Honduras, art. 4, 45 Stat. 2618.

14. Forfeitures (Key) 1

One found to be without title to land is not victim of forfeiture since he had nothing to forfeit.

Tally D. Riddell, Quitman, Miss., for McGowan et al.

Jack H. Ewing, Jackson, Miss., for Love Pet. Co., et al.

Herbert R. Ginsberg, Hattiesburg, Miss., for J. L. Sellers and W. Fairchild.

Paul M. Neville, Meridian, Miss., for Smith and Corsair Pet.

Thomas H. Watkins, Jackson, Miss., for Cecil Barnett.

Vardaman S. Dunn, Jackson, Miss., David A. Kattan, New Orleans, La., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before COLEMAN, GODBOLD and RONEY, Circuit Judges.

COLEMAN, Circuit Judge.

This is an appeal by Hamilton E. McGowan, the defendant below, and a brother of Elbert J. McGowan, deceased, from a judgment vesting an undivided one-half interest in thirty-seven acres of land in Clarke County, Mississippi in Dorotea Zaldivar V. De Tenorio, a non-resident alien, De Tenorio v. McGowan, 364 F.Supp. 1051 (S.D.Miss., 1973). Appellee De Tenorio claims the land by inheritance from her deceased sister, who, in turn, allegedly inherited the land from her deceased husband, Elbert J. McGowan. Both appellee and her deceased sister had been and were resident citizens of the Republic of Honduras.

Appellant argues that the widow lost her interest in the land by failing to comply with the requirements of a 1928 Treaty between the United States and the Republic of Honduras. He asks that title be confirmed in the defendants-cross-complainants.

We reverse and remand.

FACTS

In 1911, by deed of conveyance, Elbert J. McGowan became the owner of twenty-seven acres of land in Clarke County, Mississippi. In 1915 he acquired, by deed, ten additional acres. These parcels constitute the thirty-seven acres here in question.

Both deeds were properly recorded in the land deed records of Clarke County, Mississippi, on December 20, 1915. The District Court found that these conveyances vested E. J. McGowan with the fee simple *record* title to this land.

Between 1911 and 1914 E. J. McGowan left Mississippi and returned only twice, the last time in 1936. This was the last contact any member of the family is known to have had with him during his lifetime.

After leaving Mississippi, E. J. McGowan returned to Central America, where, in 1940, he married Maria Obdulia Zaldivar, of Honduran nationality. Although there originally were claims to the contrary, abandoned during the course of this litigation, no children were born of this union. E. J. McGowan remained a United States citizen, but died intestate on October 31, 1957, in the Republic of Panama.

Hamilton E. McGwoan, of Vossburg, Mississippi, was a brother of Elbert J. McGowan. Elbert's United States passport designated Hamilton McGowan as the person to be notified in case of his death. In 1957, Hamilton was so notified by the United States Consul in Panama. This notification revealed that Elbert's effects had been placed in the hands of his widow, and listed other known relatives as two brothers, Hamilton E. McGowan, of Vossburg, and M. M. McGowan, of Jackson, Mississippi. After Elbert's death, no member of the family communicated with his widow or undertook to advise her concerning any land E. J. McGowan owned in the State of Mississippi. Neither did she, or her counsel, communicate with the McGowans. Silence reigned supreme on both sides.

In 1958, after the death of her husband, Maria Obdulia Zaldivar McGowan left Panama, went back to Honduras, and lived there with her sister, the plaintiff-appellee here, until her death. While thus residing in the Republic of Honduras, Maria died intestate on February 28, 1969, without being remarried or having any children. At no time did she ever renounce her Honduran citizenship. She was survived by one sister, appellee De Tenorio, and one brother, Felipe. Maria's other brothers and sisters were of the half blood, and neither of her parents survived her death.

It is undisputed that the taxes on the lands in question were never paid by Elbert J. McGowan, but were always paid by his brother, Hamilton E. McGowan. In addition to paying the taxes, Hamilton E. McGowan used the land, retained the profits, and acknowledged his brother's ownership of the land in a number of ways, such as failing to have the tax assessment changed to him as owner and by subscribing as a witness to an oil and gas lease purportedly executed by E. J. McGowan in 1939.

In 1968, Hamilton E. McGowan filed suit in the Chancery Court of Clarke County, Mississippi, asserting title in himself by adverse possession and seeking confirmation of his alleged title to the land. Elbert's widow, Maria Obdulia Zaldivar McGowan, was living at the time in the Republic of Honduras, but she was not named as a party to the suit, nor was she served with notice or process. A decree was entered on the complaint by default. This decree was asserted by the defendants-appellants in the District Court as *res judicata.* The Court held that this decree was ineffective against Maria, Elbert McGowan's widow and appellee's sister, for lack of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and applicable under the terms of the Treaty between the United States and Honduras. This holding is not challenged on appeal. The District Court further held that Maria Obdulia Zaldivar McGowan's interest in the land formerly owned by her husband, Elbert, could not be divested from her in the absence of *due process of law* and *without just compensation.* It concluded by a "liberal interpretation" of the Treaty that Maria's heir, Dorotea, was entitled to the same protection.

THE LAW

The applicable Mississippi statute, Section 842 of the Code of 1942 [now Section 89-1-23 of the Code of 1972, which goes back to Section 2439 of the Mississippi Code of 1892] provides:

> "Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may;
>
> but non-resident aliens shall not hereafter acquire or hold land * * *."

[1] This statutory provision yields, of course, to any applicable provision of any valid Treaty of the United States with a foreign country, constituting a part of the Supreme Law of the Land, United States Constitution, Article 6, Clause 2, Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1879); Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947).

The pertinent portions of the 1928 Treaty with Honduras read as follows:

> "[*From*] *Article I*
>
> "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.
>
> "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by interna-

> tional law. Their property shall not be taken without due process of law and without payment of just compensation.
>
> . . .
>
> *"Article IV*
>
> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, and such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary. . . ."

By the express provisions of the Treaty, McGowan's widow had until October 31, 1960, in which to sell the thirty-seven acres of land in Clarke County. The term for the exercise of that right might "be reasonably prolonged if circumstances *render it necessary.*" (emphasis ours).

Prior to the cut off date, Mrs. McGowan took no action to sell the property, nor did she do so during the ensuing nine years. Indeed, although the record shows that Mrs. McGowan, the widow, was represented by counsel in closing her husband's affairs she died without making any inquiry or taking any action to sell the land.

The case, then, is reduced to whether under the Treaty the sister was entitled to a "reasonable prolongation" of the sale period, *rendered necessary by the circumstances.*

The District Court resolved the issue in the following manner, 364 F.Supp. at 1062:

> "It is clear under the treaty involved herein that Maria Obdulia Zaldivar McGowan had the right to acquire realty in Mississippi by inheritance, notwithstanding the common law and statute of Mississippi to the contrary. It is not so clear that her next of kin were entitled to acquire this same inheritance when she died intestate. As to this point, in the absence of specific language in the treaty providing for this eventuality, the Court is inclined to construe the treaty liberally and hold that such heirs are entitled to the same protection under the treaty as their deceased kinswoman would have had. Nor does this Court have much judicial precedent to aid in determining under what circumstances the three year period for selling the property should be reasonably prolonged. The Court has, however, carefully weighed all of the circumstances and finds that the interest of E. J. McGowan's widow *could not be divested from her in the absence of due process of law and without just compensation, both of which are guaranteed by the treaty. Otherwise is to declare a forfeiture which is not favored in law.* (emphasis added). Maria Obdulia Zaldivar McGowan had no knowledge of the provisions of the treaty or any knowledge of her inheritance or the attempted divestiture. Similarly, her heirs, plaintiff and Felipe Murillo Zaldivar, had no knowledge. *Until they were made aware of their interest, the circumstances were such as to require a prolongation of the three year period in which to divest themselves of their inherited interests.* (emphasis added). The brother, Felipe Murillo Zaldivar, has within a necessarily prolonged term divested himself

> in favor of the minor wards of Peter K. Smith, at one time in this action alleged to be the grandsons of E. J. McGowan. The named plaintiff, Dorotea Zaldivar V. De Tenorio, filed this suit within a reasonable time of her knowledge.
>
> "The Court therefore finds that the named plaintiff, a resident citizen of Puerto Cortes, Honduras, is entitled to a one-half undivided interest in and to the 37 acre tract of land * * *."

We construe the decision to stand for the proposition that the three year limitation of the Treaty is inoperative unless someone, somewhere, someway, gave Mrs. McGowan actual notice of her ownership and warned her of the Treaty limitation. At least, such was required to obviate the element of "a reasonable prolongation" if "circumstances render it necessary". The Treaty, of course, contains no such command. The additional elements of the decision are that she could not be deprived of her property without "due process of law" and "reasonable compensation". The decision does not hold that Hamilton McGowan's status as a "fiduciary" required him to give actual notice to the widow of his deceased brother. The laws of Mississippi flatly provided that the Widow McGowan could not inherit the land. The record is totally devoid of the slightest suggestion that Hamilton McGowan had ever heard of the Honduran Treaty of 1928.

Upon briefs and oral argument, our reaction to questions concerning "construction of the Treaty" is that matters of construction arise only when the language of a document is reasonably susceptible to more than one interpretation. The District Court, and the parties, have frequently alluded to paucity of precedent involving the Treaty language involved in this litigation. A reasonable explanation for this is that the language is quite plain and clear, obviating the necessity for frequent or extensive interpretation by the Courts.

[2] The language in the last sentence of the fourth paragraph of Article I, reads, "Their property shall not be taken without due process of law and without payment of just compensation." This obviously refers to one of the contracting powers taking property from the citizen of the other. This is so because private parties, personal or corporate, have never had the right to take property from another. Consequently, this limitation must be construed as referring to takings by the respective signators to the Treaty from citizens of the other. The litigation now before us does not involve expropriation, eminent domain, or any similar taking of property by governmental action. Accordingly, we are unable to see how the due process feature enters this case except for Hamilton's futile suit to acquire title, in which he obviously failed to give the notice required by Mississippi law. That failure may be explained by his ignorance, and that of his counsel, of the Honduran Treaty. Under state law, Mrs. McGowan in Honduras was clearly not a party in interest.

[3] The Treaty nowhere hints or suggests that the Courts of the respective sovereigns are to be deprived of jurisdiction to adjudicate property rights within their respective territories. An appropriate judicial determination of title takes no property; it simply adjudicates where the title legally rests. This case deals with whether, in fact and in law, the widow of the deceased McGowan, or her heirs, have any property interest in the thirty-seven acres of land. Obviously, if within the terms of the Treaty they had any property rights it was the duty of the District Court to so hold. If there were none, a similar duty existed. As to that, all the parties here

had their full day in Court and there was no denial of due process. The due process argument, therefore, is irrelevant.

This remands us to the decisive factor in the case, the application of the pertinent provisions of Article IV, which, stripped of inapplicable language, might appropriately be defined as follows:

> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, * * * such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary. . . ."

[4] We construe "circumstances rendering the action necessary" to mean circumstances existing during the three year period, such as an inability to satisfactorily clear title, an inability to sell for fair market value, wilful frustration of the effort to sell, and like events.

We have already pointed out that from October 31, 1957 until February 28, 1969—eleven years and four months—Mrs. McGowan made no effort to take any action whatever, by sale or otherwise, with reference to the property inherited, with limitations, from her deceased husband.

On what theory is it to be held, then, that this long term of inaction, almost four times the primary term prescribed by the Treaty, may at this late date be judicially prolonged as "a matter rendered necessary by the circumstances?"

The only reason advanced is that the Widow McGowan did not know of the property owned by her husband, did not know the rights conferred upon her by the Treaty, and Hamilton McGowan failed to inform her of it, although, as already stated, there is no proof that he, a layman residing in Mississippi, had any knowledge of the Treaty.

It seems likely that Mrs. McGowan did not know of the land, but the only proof to support this conclusion is the testimony of her sister, the present claimant to the property, who said that Mrs. McGowan never mentioned the existence of Mississippi or any property in it.[1]

Balanced against this is the fact that when her husband died in Panama, there was an intestate succession [administration] in that jurisdiction, in which the widow received all of her deceased husband's property in that jurisdiction, *and was represented by counsel.* Living with her husband, an American, for eighteen years she is bound to have known that her husband had a United States passport, especially since the record indicates that she had one also. In any event, the Consular report of his death named her as his heir and named the two brothers and their addresses in Vossburg and Jackson, Mississippi, as surviving relatives. If the United States Consul obtained this information from some source other than the widow, who was the only person in Panama who could have told him of it, she at least was put on notice of it when she received as she did, a copy of the Consular report.

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[1] "Q. [by claimant's counsel]:
While the two of you were living together after Mr. McGowan's death, under the same roof, did Obdulia ever mention to you anything about the United States or any property in the United States?
"A. No.
"Q. Did she ever discuss with you or mention to you anything about the State of Mississippi?
"A. No.
"Q. Did Obdulia speak any English at all?
"A. No, very little.
"Q. When you heard Obdulia talking with Mr. McGowan in what language were they speaking?
"A. In Spanish. But he didn't pronounce the language very well.
"Q. Did you ever overhear any conversation or talk between Obdulia and Mr. McGowan about any properties in the United States?
"A. No."

Conceding, however, that the widow knew nothing of the land owned by her husband the record leaves no room for doubt that she knew he had brothers in Mississippi and, if she was interested in the subject, that he might have land there.

[5] This inexorably brings us to the uniformly followed principle of Mississippi real property law that once a deed of conveyance is lodged with the proper officer *for public* record in the county where the land is located it is, from that moment, constructive notice to the world, Aultman v. Kelly, 236 Miss. 1, 109 So.2d 344 (1959); Frierson Building Supply v. Pritchard, 253 Miss. 541, 176 So.2d 301 (1965). The public land records are open to anyone who wishes to look. All her counsel had to do was make inquiry.

[6] Represented by counsel, as she was, in an estate which was formally administered in Panama, we must hold that Mrs. McGowan's failure over a period of nearly twelve years to have the records examined, or to make any inquiry whatever, although assisted by counsel, totally negates the existence of *circumstances necessitating* a prolongation of the three year period in which she had the clear right ~~to sell~~ this land and receive the proceeds.

To hold otherwise would be to say that the Treaty Makers intended that property rights within their respective jurisdiction may be left in limbo for so long as alien owners choose not to make inquiry as to the possible existence of title, open and available to the world. This could not further, but would damage, the property rights of the citizens of either jurisdiction, something they both had a duty to protect and no doubt intended to protect.

We are not altogether without precedent in the cases dealing with Treaty rights such as we now have before us.

A case similar to the one at bar is Miller v. Clausen, 8 Cir., 1924, 299 F. 723, appeal dismissed 269 U.S. 595, 46 S.Ct. 105, 70 L.Ed. 431 (1925). In *Miller*, one Andrew Hansen died in 1911 in the United States owning property here, leaving as his sole heir at law his father, Hans Christian Hansen, who was a resident and citizen of Germany. The United States had a Treaty with Germany similar to the one here involved, but with nothing comparable to Article I in the Honduran Treaty. Hans Christian Hansen, still in Germany, died in 1916. He left as his heirs brothers, sisters, nephews, and nieces. Only one of these heirs was a resident of the United States, i.e., Catharina Clausen. Thus, five years after he acquired an interest in the land from Andrew Hansen, Hans died without having made any conveyance thereof.

In 1919 the Alien Property Custodian seized the property. Catharina Clausen then filed a petition in the County Court in Nebraska to have herself declared the sole heir at law of Andrew Hansen and the Court so decreed. She then brought an action in the United States District Court against the Alien Property Custodian and the Treasurer of the United States to require delivery to her of the property. The other heirs of Hans Christian Hansen took the position that they acquired title as heirs of Hans Christian Hansen. The Eighth Circuit held, however, that the only person who could acquire property through Andrew Hansen was Catharina Clausen, who acquired same as a direct heir of Andrew Hansen *and as the only one* *who was a resident* of the United States. The Court in so holding used the following language:

> "Therefore, on the death of Andrew Hansen, something less than a fee simple absolute, a base or qualified fee or a terminable fee vested in Hans Christian Hansen, and the remainder vested in Catharina Clausen, and after a reasonable time had elapsed without Hans Christian Hansen having availed himself of the rights given him by the treaty, there was a failure of the conditions imposed by the treaty, the title of Hans Christian Hansen failed by operation of law, the statute came into full force and effect, and the full fee-simple title vested in Catharina Clausen." 299 F., at 727.

Appellee De Tenorio distinguishes this holding by pointing out that the Treaty involved in *Miller* did not have a clause which prohibited the taking of property without due process of law and without payment of just compensation, as does Article I of the Treaty with Honduras. We have already disposed of this argument, *supra*.

[7] It is urged that under the facts of this case Hamilton McGowan was "fiduciary" to the widow of his deceased brother. For reasons quickly to be stated we hold that Hamilton was not a fiduciary to his former sister-inlaw.

Prior to October 31, 1957, the date of Elbert's death, such a relationship could not have arisen because Elbert was the sole owner of the Clarke County property, acting in his own right. Before Hamilton McGowan so much as knew of the existence of a sister-in-law (which was learned from the Consul's death report), the relationship had been dissolved when Elbert died childless, Wilbe Lumber Company v. Calhoun, 163 Miss. 80, 140 So. 680 (1932).

Mrs. McGowan was an adult, not a lunatic, and personally a total stranger to her former brother-in-law. Neither before nor after October 31, 1957, did Hamilton McGowan see Mrs. Elbert McGowan or have the first word of communication with her, directly or indirectly, written or oral. In this set of circumstances a fiduciary relationship was totally nonexistent.

Neither did such a relationship arise from the conflicting interests of Hamilton and Mrs. Elbert McGowan in the title to the land. When Elbert drew his last breath on October 31, 1957, the widow was vested with title to the land which her husband had formerly owned, *with sole power of disposition,* subject to defeasance only in the event of her own failure to comply with the terms of the Honduran Treaty. On the other hand, Hamilton's interest in the land was a vested remainder, which Mrs. McGowan could defeat at pleasure by complying with the Treaty. See Mississippi College v. May, 235 Miss. 200, 108 So.2d 703 (1959).

[8, 9] Consequently, Hamilton McGowan was neither a tenant in common nor a joint tenant with his former sister-in-law. His interest conflicted with hers to the extent that he could only hope for title in fee if she failed to exercise her right of disposition in compliance with the Treaty. The fiduciary principles usually applicable to such tenancies in common simply did not apply here. In the total absence of an agreement to the contrary, the hostility of Hamilton's interest to that of his sister-in-law was the antithesis of a fiduciary relationship. No law could require him to aid a total stranger to defeat his own title.[2]

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[2] We cannot agree that Hamilton McGowan's long and continued use of the land with his brother's permission created a trust, the obligations of which would pass to the permissive brother's widow. Under Mississippi law, McGowan was undoubtedly a mere tenant at will or sufferance. See St. Regis Pulp and Paper Corporation v. Floyd, 238 So.2d 740, 743 (1970), and the Mississippi cases there cited.

[10] Neither does the fiduciary argument attribute proper signficance to the indisputable fact that under Mississippi law real property could not be inherited by a Central American alien. If Hamilton McGowan acted in reliance on the Mississippi statute prohibiting inheritance of real property by aliens, and if he did not know of the Honduran Treaty, then he was guilty of no intentional dereliction for, in the absence of the Treaty, no duty could have existed. The record in this case is totally bare of any evidence of treaty knowledge on the part of Hamilton.

The legal brook in this litigation ultimately runs down to the proposition which the District Court seems to have adopted, that is, with no more communication or contact than he had with his former sister-in-law, the failure of Hamilton McGowan to give her actual notice of the existence of the land and of her Honduran Treaty rights establishes, within the terms of the Treaty, the required "necessity" for the prolongation of the specific three year term in which Mrs. McGowan could have freely sold the land. Indeed, the effect of the District Court judgment is that this "necessity" would continue until someone, somewhere, someway, should give actual notice to an alien inheritor of land, or to those who inherit from the original inheritor, and so on down the line.

Such a construction of the Treaty, where there are aliens in the chain of title would make a shambles of land titles. That is exactly what happened here. There was no effort to enforce the Treaty rights until an oil well had been brought in, whereupon the Treaty was dusted off in an effort to scramble the title, an eventuality which surely must have been beyond the anticipation of those who drafted, signed, and ratified the Treaty in an effort, for a reasonable time, to confer upon aliens a right which by state law was categorically denied.

Accordingly, we hold that the primary term in which Mrs. McGowan could have exercised the Treaty right of disposal expired on October 31, 1960; that during that time frame, and for the remaining eight years of her life, no existing necessity was claimed by her for the prolongation of the three year period. Neither have the subsequent heirs established any such necessity. The total inaction reflected by this record cannot, by some kind of judicial wand waving, be converted into "a necessity".

We need not reach or decide what rights Mrs. McGowan's heirs might have had if she had died during the three year period prescribed by the Treaty. She lived on until 1969, taking no action, under the Treaty or otherwise.

There are sundry other arguments which have not gone unnoticed.

Appellee turns the spotlight on Section 842 of the Mississippi Code of 1942, which allows non-resident alien citizens of Syria or the Lebanese Republic to inherit property from citizens or residents of Mississippi, but denies that right to all other non-resident aliens. Hence, she argues that the statute "denies to these selected aliens the equal protection of the law, contrary to the Fourteenth Amendment [and] constitutes an unconstitutional intrusion by the state into the field of foreign affairs which is entrusted to the President and Congress".

[11, 12] Resident aliens, lawfully in the United States, are undoubtedly entitled to the equal protection of the law, Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). It is equally obvious that the Fourteenth Amendment, by its own terms, has no application to aliens not within the jurisdiction of the United States.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Mississippi statute was not attacked in the District Court and there was no request that a three judge court be convened. In any event, when the statute was last amended, Chapter 237, Laws of Mississippi of 1940, it contained the usual severability clause [Section 4]. Additionally, if the statute, as presently written, were to be invalidated, necessitating a return to the previously existing valid statute[3] the legal status of the plaintiff-appellee as a non-resident alien would remain the same. To go a step further, if all the statutes were to be set aside, the status of the non-resident alien under the common law would prohibit her owning title to land in Mississippi, Scottish American Mortgage Company v. Butler, 99 Miss. 56, 54 So. 666 (1911).

[13] Appellee suggests that if she cannot acquire title to the land (for sale under the Treaty) then the property must necessarily escheat to the State. The Mississippi claimants to this property are parties to this litigation. We, therefore, point out that although § 89-1-23 Mississippi Code Ann., 1972, provides for all land acquired contrary to that section to escheat to the State, it must be read in conjunction with § 89-11-1 Mississippi Code

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[3] Lawrence v. Mississippi State Tax Commission, 162 Miss. 338, 137 So. 503; affirmed, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374.

Ann., 1972, which escheats property to the State when a person dies intestate *leaving no heir capable of inheriting the property* (emphasis added). Under Mississippi law the non-alien heirs had a vested remainder in the land, see Mississippi College v. May, *supra.*

In accord is 3 Am.Jur.2d, Aliens & Citizens, § 27, page 874:

> "It is a principle of the common law that while an alien cannot inherit, neither can he interrupt the descent of others, and therefore, if some of the persons answering the description of heirs are incapable of taking by reason of alienage, they are disregarded and the whole title vests in those heirs competent to take provided they are not compelled to trace their inheritance through an alien."

And, also, 27 Am.Jur.2d Escheat, § 12, page 880:

> "Incapacity of the heirs first entitled to succeed to property will not effect an escheat, but the property will pass to the persons next entitled to take as though the first heirs had not existed."

Appellee places great weight on Guiseppe v. Cozzani, 238 Miss. 273, 118 So.2d 189 (1960); 248 Miss. 588, 159 So.2d 278 (1964); and 193 So.2d 549 (1966). This case, which made three appearances in the Mississippi Supreme Court, is distinguishable from the case at bar. *Guiseppe* involved tenants in common, some of whom were aliens living in Italy. Under the terms of a will left by a deceased in 1906, their rights accrued subject to a life estate which ended in 1933. In the first appeal, the Mississippi Supreme Court held that the complaint filed by the alien heirs was sufficient to state a cause of action and that the Chancery Court erred when it sustained the defendant's demurrer. At the second trial, no evidence was taken and the Supreme Court held on appeal that the lower court had abused its discretion when it refused to grant a continuance and dismissed the complaint with prejudice. On the third and final appeal, the Mississippi Supreme Court held that when the heirs in America filed an affidavit in Chancery Court that there were no living heirs in Italy, *knowing this to be false,* they perpetrated a concealed fraud on the Chancery Court and the alien relatives, and that the alien relatives were not barred by the adverse possession statute, § 15-1-9, Mississippi Code Ann., 1972, from maintaining the suit in equity. The case turned on fraud, not on an extension of time under a Treaty.

Under Mississippi law, when a person dies intestate and leaves no wife, children, or children of deceased children, any land owned in the State descends to his brothers, sisters, and parents in equal shares, § 91-1-3, Mississippi Code Ann., 1972.

[14] Appellee has extensively briefed this case as if it were one involving a forfeiture of property and the District Court alludes to forfeitures. We see it, however, as one to adjudicate title to property. In all such cases the true status of the title is decided. One found to be without title is not the victim of a forfeiture. He had nothing to forfeit.

The judgment of the District Court is reversed and the cause remanded to the District Court for further proceedings not inconsistent herewith.

Reversed and remanded.

GODBOLD, Circuit Judge (dissenting).

The central point of this case is the fact that Hamilton McGowan was a fiduciary for his brother and for his brother's widow. His status as fiduciary requires a conclusion that the interest of the widow is protected against his claim of title.

The terms of the treaty provide that the three-year period in which the widow must sell her interest is "reasonably prolonged if circumstances render it necessary."[1] In the circumstances of this case, where a fiduciary failed to inform his alien beneficiary of her interest in the property which was the subject of his fiduciary relationship, asserted title to the property in himself, and attempted to divest the widow of her interest by a state court proceeding without notice to her, it is necessary that the three-year period be "reasonably prolonged." A declaration that Hamilton holds the legal title subject to a constructive trust in favor of the widow, and that she must dispose of her equitable interest within a future time equal to that provided by the treaty, will fairly vindicate all interests in this case.

To permit Hamilton to neglect and abuse a familial-based fiduciary relationship as was done in this case and by doing so acquire title to the property which as fiduciary he was obligated to protect was too strong for the nostrils of an able and experienced trial judge. It is too strong for mine as well.

1. *Hamilton is a fiduciary.*

The District Court characterized Hamilton as a fiduciary. This factual conclusion of the trial court, necessarily determined on a case by case basis, is not plainly erroneous.

The law of fiduciary relationships is a creature of equity and gives effect to obligations of good conscience and fair dealings between persons who are in such relationship to each other that trust and confidence have been reposed by one to another, or both to each other. The underlying relationship may be what the Mississippi Supreme Court had called "conventional" in form, Ham v. Ham, 146 Miss. 161, 110 So. 583 at 584 (1926), that is, arising from familiar and defined legal relationships. These include trustee and beneficiary, agent and principal, guardian and ward, partners and joint venturers, life tenant and remainderman, executor or administrator and heirs, tenant and cotenant. Restatement of Trusts 2d[2] § 2(b); 2 Scott on Trusts (3d ed.)[3] § 170-21 at 1366 n. 2; 5 Scott § 495 at 3534. But, necessarily, the equitable concept of the fiduciary is not quickened by only those relationships formalized into precise "conventional" legal structures. "The relation and duties involved in it [a fiduciary relation] need not be legal, it [a fiduciary relation] may be moral, social, domestic, or merely personal." Ham v. Ham, *supra* at 584 (quoting 2 Pomeroy Equity Jurisprudence (4th ed.) § 956).[4]

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[1] The District Court held that the heirs of the widow are entitled to the same protection as she would have had. No party questions this conclusion. For convenience I refer to the interests of widow and heirs as though the widow were still living.

Mississippi gives very broad scope to the equitable doctrine of the fiduciary and of constructive and resulting trusts that are means of enforcing the fiduciary's duties.

> [T]he relation [of fiduciary] is not restricted to such confined relations as trustee and beneficiary, partners, principal and agent, guardian and ward, managing directors and corporation, etc. Davis v. Hamlin, 108 Ill. 39, 48 Am.Rep. 541; Cushing v. Danforth, 76 Me. 114; 32 Am.Jur. 835, Sec. 991; Probst v. Hughes, 143

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[2] Hereinafter "Restatement."

[3] Hereinafter "Scott."

[4] In *Ham* the persons involved were partners, but the court chose not to rely upon that "conventional" foundation but rather to look to their closer and more intimate relations.

> Okl. 11, 286 P. 875, 878, 69 A.L.R. 929. It applies to all persons who occupy a position out of which the duty of good faith ought in equity and good conscience to arise. "It is the nature of the relation which is to be regarded, and not the designation of the one filling the relation." Davis v. Hamlin, supra. In the Probst case, supra, the Court said: "* * * a trusteeship may arise by virtue of any relationship of the parties in which it may be said that the one occupying the position of trustee is in duty bound to act in the utmost good faith for the benefit of the other."
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> * * *
>
> "Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."

Risk v. Risher, 197 Miss. 155, 19 So.2d 484 at 486-87 (1944) (sublessee negotiating new lease from lessor, held to be in a fiduciary relationship to the lessee-sublessor and to hold new lease as trustee for lessee-sublessor).

In Sojourner v. Sojourner, 247 Miss. 342, 153 So.2d 803 (1963), the complaint alleged that by informal and unwritten family agreement heirs to family property conveyed their interests to a brother on his promise to transfer it to his sister by deed or will after a fixed period of years. Upon his death after 11 years the sister claimed title as against the brother's widow, alleging that the widow had knowledge of the family arrangement. The complaint was held sufficient on fiduciary-constructive trust grounds.

The court negatived the necessity for an "express" relationship and said:

> [A] constructive trust for fraud or wrong, being based on the equitable principle that no one can take advantage of his own wrong, exists in almost any case where there is a wrongful acquisition or detention of property to which another is entitled.

Id. at 808. *See also*: Adcock v. Merchants & Manufacturers Bank, 207 Miss. 448, 42 So.2d 427 (1949). Bank employee, managing, controlling and collecting rents on bank's land, title placed in his name for convenience, held a fiduciary and constructive trustee for bank; unnecessary to show fraud.

I turn to examination of the relationship between Hamilton and Elbert McGowan, recognizing that it need not, and possibly does not, fit precisely into the four corners of a "conventional" pigeonhole of the law. The beginning point is, of course, that the two were blood brothers. Elbert was absent in a foreign country, seldom returning home,[5] in no position to protect his interest in 37 acres of Mississippi land. Hamilton managed and farmed his own and other family land adjacent or nearby, so it was natural that he be called upon to care for Elbert's two small tracts. The terms of the arrangement agreed upon with Elbert's land as subject matter are not in dispute. The District Court relied upon Hamilton's own description, made in his sworn complaint in the state title confirmation suit that he filed in 1968:

> Your Complainant would show that since the purchase of the land by the said E. J. McGowan from his uncle,

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[5] Twice between 1911 and his death. In his passport Elbert showed Hamilton as the person to be notified in the event of his death.

> T. J. Evans, in 1911 that he, your Complainant, has had the exclusive control, use, occupation and management of the said land. That he farmed it each and every year, and never at any time attorned to his brother or paid him anything for the use thereof; neither was the same expected or required of him.
>
> Complainant further says that he paid all ad valorem taxes upon the land and has paid the same since his brother purchased the land in 1911 when he was away from home working on the Panama Canal, as aforesaid. Thus, for fifty-seven years between 1911 and this date Complainant has paid all the taxes and had exclusive use of the same, farming, tilling or renting the same out for the purpose of farming and tilling at all times. However, Complainant admits that he was, between 1911 and 1936, performing all of these duties without claiming title to the land as a favor to his brother and for the use of the said lands.

For more than half a century Hamilton enjoyed the permissive use of the land, managing and farming it along with his own and other family land as a unit through tenants. He retained the profits, paid the taxes and, as Judge Coleman points out, acknowledged his brother's ownership of the land in a number of ways.

In Wofford v. Wofford, 244 Miss. 442, 142 So.2d 188 (1962), a son managed the real estate of his mother, exercising control over it, repairing buildings on it, and paying taxes on it. Subsequently he claimed to be owner of the property by virtue of a quitclaim deed from his mother and a tax deed pursuant to a sale for unpaid taxes. Though finding no actual fraud, the Mississippi Supreme Court held that he was a fiduciary for his mother. The court noted the holding in Ham v. Ham, *supra,* that had pointed out the existence of fiduciary relations other than those cast in "conventional" terms. It then held that the quitclaim deed was prima facie voidable and that the son had been unable to sustain his contention that it represented a gift. The tax deed was held to give no rights to the son:

> G. W. Wofford was managing the lands at that time for his mother. His relation to his mother at that time was that of a fiduciary; and it is well-settled that a business agent or other fiduciary charged with the management of his principal's property cannot purchase and retain a tax title to the property for his own benefit. Pomeroy's Equity Jurisprudence, Vol. 3. Fifth Edition, p. 825, Sec. 959c, and cases cited.

142 So.2d at 197.

In Minor v. McDowell, 113 So. 576 (Miss.1927), a son managing his mother's plantation was held to be in an agent-principal relationship with her. In a second appeal of the same case, the Mississippi Supreme Court held:

> The relation between these parties as heretofore declared by the court was that of principal and agent. A cardinal requirement of that relationship is that the agent shall be at all times loyal and faithful to the interests of the principal, and he can acquire no private interest of his own in opposition to that of his principal. There is a fiduciary relation which forbids the agent in any manner to place himself of his own volition in a favored position as against the principal in respect to the transactions growing out of the relationship.

McDowell et al. v. Minor, 158 Miss. 788, 131 So. 278 at 280 (1930). Another principal-agent case is Van Zandt v. Van Zandt, 227 Miss. 528, 86 So.2d 466 (1956), discussed *infra*. *See also* Restatement of Agency § 389.

In Guiseppe v. Cozzani, 238 Miss. 273, 118 So.2d 189 (1960); 248 Miss. 588, 159 So.2d 278 (1964); and 193 So.2d 549 (Miss.1969), decedent died in 1896 leaving a life estate to his widow with remainder over to his nieces, nephews and a sister. The widow died in 1933. A niece residing in Mississippi conspired with her (the niece's) son to make herself sole owner to the exclusion of the other heirs, who were residents of Italy. The son petitioned to be appointed administrator of the estate, and in that petition and his subsequent petition to close that estate, made false representations the effect of which was that his mother was the sole person entitled to the property. He represented that his mother and decedent's sister named in the will were the only persons entitled to share in the estate and that the sister had died and after diligent search and inquiry he had ascertained that she had no living descendants. In fact he had made no search or inquiry. He represented that no other persons had any interest in the estate and that his mother was sole owner. He made no mention of the nieces and nephews in Italy. In 1958 ten Italian nieces and nephews filed suit 25 years after they became entitled to interests in the property. The Mississippi Supreme Court, reversing the trial court, considered two related issues: whether the interest of the Italian heirs as cotenants had been cut off through adverse possession by the cotenant Mississippi niece, and whether the Italian heirs were barred from relief by the limitations period of § 710 of the Mississippi Code of 1942 [now § 15-1-9, Miss.Code Ann. 1972], which is extended by "concealed fraud." See 193 So.2d at 552-53, 554.

With respect to the first of these issues, the court held that the Mississippi niece was a tenant in common with the Italian nieces and nephews, and therefore in a fiduciary relationship with them which prevented her from holding by adverse possession without an "ouster" through actual knowledge to them of her adverse claim or through conduct so unequivocal that knowledge by those out of possession must be necessarily presumed. *Id.* at 553-54. As to the second issue, the court held there was concealed fraud, with the result that "these complainants are not barred from maintaining this suit in equity by virtue of the provisions of the Mississippi Code of 1942 Annotated, Section 710." *Id.* at 554. Thus the holding on the concealed fraud issue went to the timeliness of the suit. That holding does not purport to limit the right to relief against a fiduciary to situations in which he has committed concealed fraud. In Wofford v. Wofford, *supra*, the fiduciary was held liable although there was no fraud or misrepresentation. 142 So.2d at 194. *See also* Adcock v. Merchants & Manufacturers Bank, *supra*. In the instant case the District Court elected to use gentler words than fraud, but if fraud is a requisite it was present here.[6]

> [A]s between persons sustaining a fiduciary or trust or other confidential relationship toward each other, the person occupying the relation of fiduciary or of confidence is under a duty to reveal the facts to the plaintiff (the other party), and that his silence when he ought to speak, or his falure to disclose what he ought to disclose, is as much a fraud at law as an actual affirmative false representation or act. . . .

Van Zandt v. Van Zandt, 227 Miss. 528, 86 So.2d 466 at 470 (1956) (holding that a cotenant having powers of attorney from the other owners was their agent in consummating a sale of timber from the land and was a fiduciary, required to exercise loyalty and good faith and to report to his principals the fact of the sale and to pay over their share of the proceeds).

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[6] The facts that require a conclusion of fraud are dismissed in part 4, *infra*.

The response of appellants to the fiduciary issue is twofold. First, they say that Hamilton was not a manager as in *Wofford*, or an agent as in *Minor*, or a tenant in common and agent as in *Van Zandt*. Hamilton could be characterized as a "manager" as in *Wofford* though with fewer managerial duties and less stringent fiduciary obligations. One could describe him as an "agent" as in *Minor*, though with fewer duties as agent and fewer burdens as fiduciary. And he can be termed as "agent" as in *Van Zandt* though less formally authorized. But dialogue such as this misses the mark. The existence of fiduciary obligations is not limited to "conventional" forms and does not turn on rubrics. Ham v. Ham, *supra;* Risk v. Risher, *supra;* Sojourner v. Sojourner, *supra.* It is clear beyond cavil that if the same arrangement had been made but Hamilton were a cotenant with his brother, Hamilton owing 1/10 and Elbert 9/10, Hamilton would be a fiduciary.

> Because of the mutuality of their interests, possession and obligations, the relationship between cotenants is confidential and fiduciary in nature. Each has a duty to sustain, or at least not to assail, the common interest, and to sustain and protect the common title.

Nichols v. Gaddis and McLaurin, Inc., 222 Miss. 207, 75 So.2d 625, 629, 78 So.2d 471 (1974); *Guiseppe III, supra.* Lacking the 1/10, he is no less bound to deal fairly and honorably with his brother.

Appellants' second response is that if there were a fiduciary relationship it terminated upon Elbert's death and Hamilton owed no obligation to the widow. This is discussed in part 3, *infra.*

2. *Hamilton's obligations as fiduciary.*

Fiduciary relationships are of varying degrees of dignity, and some impose more stringent obligations than others. 5 Scott § 495 at 3534. We need not define the outer limits of Hamilton's obligations with respect to his absent brother and to the land that was the subject of their arrangement. At a minimum he was under several duties that dispose of this case. He was under a duty of loyalty to his brother, to act to Elbert's benefit and not to profit at his expense. Restatement §§ 2(b), 170 and Comment a; 1 Scott § 2.5 at 39; 5 Scott § 495 at 3534. He had a duty to administer the subject matter solely in Elbert's interest. Restatement § 170(1) and Comment a. He was under a duty to use reasonable care and skill to protect the property that was the res of the relationship. Restatement § 176; 2 Scott § 176. He may not compete with the beneficiary in the acquisition of property. 5 Scott § 504. It is but to state the obvious, to say that Hamilton could not in derogation of duties such as these claim as his own the land that was the subject matter of the relationship of trust and confidence.[7] A fiduciary who has acquired a benefit by a breach of his duty as fiduciary is under a duty of restitution to the beneficiary. Restatement of Restitution § 138.

A fiduciary is required to supply information to the beneficiary concerning administration of the trust only upon request. *See* Restatement § 173. But the law of trusts, embracing as it does both common sense and honorable dealings, applies a different rule where the fiduciary's personal interest collides with his duty to the beneficiary. If he deals with the beneficiary on his own account he is under a duty "to deal fairly with him and to communicate to him all material facts in connection with the transaction which the [fiduciary], knows or should know." Restatement § 170.[8] *See also* Van Zandt v. Van Zandt, quoted *supra.*

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[7] He could not even purchase the property at a sale, foreclosure or otherwise, even though he paid a fair consideration, because this would place in conflict his personal interest and his duty as fiduciary. Restatement § 170, Comment b; 2 Scott § 170.2. It would be strange indeed if, without paying anything, he could by silence maneuver himself into ownership of that which he could not purchase at a fair price.

It is immaterial that Hamilton made no promise to Elbert of specific duties that he would carry out. The consequences of a fiduciary relationship flow from the relationship as a matter of law. 1 Scott § 2.5 at p. 40.

3. *Hamilton is a fiduciary for the widow.*

Appellant's second response to the District Court's view of Hamilton as a fiduciary is that even if he were under fiduciary obligations to his brother the relationship was terminated by Elbert's death, and Hamilton had no duty to the sister-in-law that his counsel describe as "a native Honduran woman" . . . "whom he never saw and only heard of through the [United States] Consul." This could not be more wrong. Upon the death of Elbert, his rights as the beneficiary of a fiduciary obligation descended to his widow in the same manner as did the land itself. Miss.CodeAnn.1972, § 91-1-9; Restatement § 142.[9]

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[8] The principles here involved are parallel to those of the law of adverse possession. One who has come into possession permissively must evidence his intent to claim adversely by acts of occupation sufficient to demonstrate hostile possession. As the trial judge noted in this case, permissive occupation is so usual by persons in familial relationships that acts which might be sufficient to demonstrate to strangers hostile possession may not be sufficient with respect to family members. Similarly, before a tenant can claim adversely against his cotenants there must be "ouster" by actual knowledge to the cotenants, or the equivalent. See discussion of *Guiseppe III,* in part 1, *supra.*

> If a beneficiary of a trust dies intestate, and if his interest does not terminate on his death, the devolution of his interest is governed by the same rules of descent and distribution as govern the descent and distribution of a corresponding legal interest. . . . [I]f the trust property is real estate, the interest of the beneficiary passes to his heirs. (Footnotes omitted.)

2 Scott § 142.

Hamilton continued in possession of the land, enjoying the use and profit, and assessing it in the name of the estate of which the widow was the sole beneficiary (subject to the "three-year plus reasonable prolongation" provision of the treaty). The courts have characterized in varying ways the precise interest of the alien in circumstances such as those before us. The appellants refer to it as a fee simple determinable.[10] Whatever its precise character, the widow had an interest in the land, commencing at her husband's death and extending thereafter for three years plus any reasonable prolongation thereof. With respect to her interest Hamilton continued to be a fiduciary as he had been for her husband.

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[9] Hamilton was a fiduciary with respect to the widow for another reason also. Although there was no administration of Elbert's estate in Mississippi and Hamilton had no status as representative thereof, he purported to act as representative. He changed the tax assessment to read "E. J. McGowan estate" and until 1968 taxes paid by him were shown on the records as received from that estate. Whatever his precise legal status, as the person in possession of the decedent's property pursuant to an agreement with the decedent and holding himself out as authorized to act on behalf of the estate, he was under fiduciary obligations to the heirs of that estate.

[10]

> "There is much discussion in the cases as to the nature of the title which nonresident aliens held under the terms of this treaty. Some authorities denominate it a base or qualified fee, and others as a determinable fee. The terminology is not of controlling importance."

Pierson v. Lawler, 100 Neb. 783, 161 N.W. 419, 420 (1917).

As with respect to Elbert, the maximum perimeters of Hamilton's obligations to the widow need not be marked. Under the narrowest, most minimal standards of faithfulness, fair dealing and the trust and confidence that undergird fiduciary relations, Hamilton was bound to notify her that he was a fiduciary of certain land in which she had a [fee simple determinable] interest and that she was now the beneficiary of the obligations which he owed with respect to the land and to the owner thereof. Notice to her and action by her was the only way in which the interest to which his obligations attached could be preserved from destruction, for he had no power to sell for her. He would have been obligated to give her notice of circumstances that might cause her to lose her rights to a stranger. "No one is required to watch the clerk's office to see that those in possession of property in privity with him or in subordination to his title are not acquiring rights adverse to him." Nichols v. Gaddis and McLaurin, *supra*, 75 So.2d at 633. Inarguably he was compelled to inform her that if she failed to timely act he intended to deal with the res for his own account and adversely to her by himself claiming as an heir of his brother. Van Zandt v. Van Zandt, 86 So.2d at 470, quoted *supra*; Restatement § 170(2).

The situation here is similar to that in which the subject matter of a fiduciary relationship is a leasehold interest. The fiduciary may not secure a renewal of the lease for his own benefit. Risk v. Risher, *supra*; 2 Scott § 170-21. Like a fiduciary-lessee in possession and seeking a renewal for himself, Hamilton draws his right to possession from someone other than the beneficiary; also he made no effort to "evict" his beneficiary by terminating his relation with her during the "term"—in her case three years—but sought, and secured, through channels independent of her and without notice to her, the interest available upon the termination of her interest.

4. *Hamilton's breach of fiduciary obligations.*

From his brother's death in 1957 until this suit was filed in 1971, Hamilton made no attempt to communicate with the widow, although he had been informed of her status and her name and address by an official report sent to him in 1957 by the U.S. consul in Panama. His lame explanation that he didn't believe that his brother was married was no explanation at all, and the District Court so treated it. Even if he was unwilling to believe that his brother had married "a native Honduran woman," he knew the name, address and identity of the person who held herself out to be Elbert's wife, and who had been accepted by the United States Consul in Panama as Elbert's wife for purposes of the Consul's Report[11] and to whom his personal effects had been turned over.

The result in this case would be the same if Hamilton's failure to inform the widow were done without improper intent. But we are not left to guess at his intent. His daughter, an experienced businesswoman, handled payment of the taxes for him. Beginning around 1951 she had attempted, but unsuccessfully, to have the assessments changed from Elbert's name to her father's.

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[11] Report of the Death of an American Citizen, Form FS-192. Under familiar evidentiary rules this official certificate would almost certainly be admissible in a court, against hearsay objections, to prove the truth of the matter asserted therein, a much higher threshold to pass than that for notice necessary to trigger the attention of a fiduciary.

In 1968 Hamilton filed his "confirmation suit" in Mississippi state court claiming title by adverse possession to the land. The District Judge referred to this as an "attempted divestiture of the widow". At no time had he given notice to the widow that he intended to claim adversely the land that for half a century he had held permissively. See footnote 8, *supra*. Hamilton named as parties to the suit his brothers and sisters, the widow of a deceased brother other than Elbert, and "unknown heirs, if any of E. J. McGowan." Elbert's widow was not named as a party. Process was had on various named defendants, their addresses having been given. The remaining process was by publication addressed to "unknown heirs, devisees and executors, if any of E. J. McGowan deceased, whose whereabouts, places of residence and post office addresses are unknown." At this time, the District Court found, Hamilton "made no effort to locate [the widow], or have process directed to her by name at her last known address." Also, as the trial judge found, he did not allege, as required by Mississippi law, Warren v. Clark, 230 Miss. 873, 94 So.2d 323 (1957), that he had joined all parties interested in the land so far as they were known to him and could be ascertained by diligent inquiry. Such an allegation would have been false.

Hamilton took a default judgment in the confirmation suit. The assessment to 27 of the 37 acres[12] was changed shortly thereafter from "E. J. McGowan estate" to Hamilton's name. Oil had been discovered on the land at a date not revealed by the record. Beginning in late 1958 and continuing to the filing of this suit Hamilton participated in a series of oil leases, royalty contracts, and similar documents relating to the property in question. Elbert's widow died in 1969. Around 1970 the heirs of the widow, residents of Honduras, learned of the land through persons interested in oil development. Thereafter the widow's sister brought this suit. In the District Court Hamilton claimed a parol gift of the land but wholly failed to establish it, and the appellants have abandoned that claim.

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[12] There is no explanation of why the assessment on the other ten acres was not changed.

The facts here are remarkably parallel to those in *Guiseppe*. There the nephews and nieces in Italy were uneducated people who knew nothing of the United States and its courts and legal records. The "native Honduran woman" of this case had a fifth grade education, and spoke little, if any, English and, so far the record discloses, knew nothing of her husband's 37 acres in Mississippi. In each case a knowledgeable resident was on the scene in Mississippi.[13] In both cases the resident with no notice to the distant members of his family, attempted to claim adversely to them. In both cases the resident employed state court procedures as a device to exclude his alien relatives. In *Guiseppe* the son affirmatively misrepresented in the state court suit. In this case Hamilton omitted an element of pleading that would have required that he reveal the facts or swear falsely. The Mississippi Supreme Court, in *Guiseppe III*, 193 So.2d at 553, treated with unconcealed disdain the failure of the resident to carry out his duty of diligently seeking out heirs in Italy.

The District Judge in this case found that the state court confirmation suit did not deprive the widow of her interest because as a matter of law Hamilton's permissive use and possession of the land was not adverse at least until 1957, and because due process was violated by failure to give her notice of the suit. The court then found with respect to the three-year period provided by treaty that "until [the widow and her heirs] were made aware of their interest, *the circumstances were such* as to require a prolongation of the three year period in which to divest themselves of their inherited interests" (emphasis added), and that plaintiff had filed this suit within a reasonable time after she learned of her interest.

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[13] For many years Hamilton, in addition to farming, had engaged in securing and putting together oil leases.

As I understand Judge Coleman's analysis it is this: the widow loses, but not because of the judgment in the confirmation of title suit, the validity (or lack of) which he does not discuss. She loses because she failed to sell her interest within three years and it terminated by operation of law in 1960. Title fell like a ripe peach into the lap of Hamilton, not under the judgment in the confirmation suit but because he was the sole remaining heir of Elbert entitled to take.[14] Judge Coleman declines to "reasonably prolong" the three-year period because the widow knew that her husband had family in Mississippi and could have inquired, and, in any event, she was put on notice of her husband's ownership by the Mississippi public records.

Uniformly the courts agree that what is an allowable period in which the alien must dispose of his interest, whether under a statute calling for "reasonable time," or one calling for a term of years, with a "reasonable prolongation," requires case by case analysis of the circumstances. Scharpf v. Schmidt, 172 Ill. 255, 50 N.E. 182 (1898) (commencement of suit for partition two and a half years after alien's death held to comply with two years plus reasonable prolongation); Ahrens v. Ahrens, 144 Iowa 486, 123 N.W. 164 (1909) (50 years after alien's death held outside of "reasonable time" statute where no "excusing facts or circumstances" existed); Pierson v. Lawler, 100 Neb. 783, 161 N.W. 419 (1917) (same treaty provision as at bar, alien failed to prove circumstances showing necessity for prolongation of eight years). Fischer v. Sklenar, 101 Neb. 553, 163 N.W. 861 (1917), points out that the original and specific term of a treaty providing for such a term plus reasonable prolongation merely prevents the state from limiting the term to a shorter period. To refuse to permit such further time as is reasonable "would, for all practical purposes, render this [prolongation] provision of the treaty nugatory, while like any other instrument, it should be construed to give it practical effect rather than to make it ineffectual."[15] *Id.*

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[14] Under § 91-1-3 Miss. Code Ann. 1972, the brothers and sisters of Elbert would inherit. Some or all of those other than Hamilton appear to have deeded their interests to him. In any event, the confirmation suit appears to have been valid with respect to them.

I find no other case involving similar treaty provisions in which the issue of breach of fiduciary relationships has been presented. In Miller v. Clausen, 299 F. 723 (CA8, 1924), relied upon by Judge Coleman, the decedent died in 1911, the owner of Nebraska land, leaving a sister Catharina, residing in Nebraska, and a father, brothers and sisters, and other kin, all residing in Germany. The father, Hans, died in 1916, having failed to exercise his treaty-given right to sell, which was for a reasonable time after the death of the decedent. The Alien Property Custodian seized the property in 1919. Catharina filed a petition in Nebraska state court in 1922 for a decree of heirship, and that court entered a decree that she was the only heir of decedent qualified to take title to the real estate.

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[15] Modern cases hold that after the treaty period has run its course the alien's estate is defeasible as against the state, and subject to be defeated by an action to declare the property escheated. Until the action is brought the alient retains the power to convey title good against the world. Dutton v. Donahue, 44 Wyo. 52, 8 P.2d 90 (1932); Abrams v. State, 45 Wash. 327, 88 P. 327 (1907); Louisville Ins. Co. v. Comm., 147 Ky. 72, 143 S.W. 1044 (1912).

She then sued the Alien Property Custodian for possession of the property. The Eighth Circuit rejected the Custodian's argument that Catharina took, if at all, by inheritance from the father so that his title having failed, she took nothing, and held that she took directly as the heir of decedent. No contention was made that Catharina was in a fiduciary relationship to her father or her German kin.[16]

The District Judge in this instance made the factual analysis that the case law requires, and found that the widow had no knowledge of: (a) the provisions of the treaty, (b) her inheritance, and (c) "the attempted divestiture" [by Hamilton], nor did her heirs have such knowledge. He concluded that a prolongation was required, and that it should extend until the heirs had knowledge of their interest. Without a tip of the hat to the plainly erroneous rule, Judge Coleman reverses these findings and holds that no extension was necessary.

His conclusion of no necessity for prolongation has two bases, the duty of the widow to inquire whether her husband owned Mississippi land and the constructive notice to her by the Mississippi recording statutes. The first founders upon the duty of the fiduciary-adverse claimant to tell her the facts. The recording act argument was advanced by the fiduciary in *Guiseppe* and rejected by the Mississippi Supreme Court.

> All of the nephews and nieces of Frank Toney, except Mary Cozzani, lived in the Republic of Italy, at the time of his death in 1896. They, thus, lived

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[16] Assuming the Custodian would have had standing to raise such an issue, there is no mention of any fidiciary relationship during decedent's lifetime and upon his death an administrator was appointed and took possession of the property, although Catharina was permitted to live on it.

> some 4,000 miles from the shores of the United States. They were uneducated people who knew nothing about the United States, its laws, its courts and its legal records. How could this Court or any court hold that these illiterate people, 4,000 miles away, were given actual notice or the equivalent thereof by the filing of pleadings and deeds in the Warren County Chancery Clerk's Office in Vicksburg, Mississippi?

Guiseppe III, supra, 193 So.2d at 554. We find no comparable case in which recording acts have even been considered as a relevant factor. Necessarily the cases will often concern aliens who by reasons of distance, family separation, language, and educational barriers, do not know of their interests in land in the United States and are delayed in learning. To give to the local recording acts the effect proposed by Judge Coleman substantially erodes the possibility for "reasonable prolongation" in such cases and makes the prolongation provision of limited utility. See Fischer v. Sklenar, *supra.*

The three-year provision of the treaty implements state policies against alien ownership of land and in favor of repose of land titles. The constructive trust is the usual equitable means of enforcement against the fiduciary who has secured for himself a benefit that in fairness and honorable dealings belongs to his beneficiary. Sojourner v. Sojourner, *supra*; Adock v. Merchants & Manufacturers Bank, *supra;* Restatement of Restitution §§ 160, 190, 199, and see also § 195; Restatement § 1(e). A declaration that Hamilton holds legal title but as constructive trustee for the widow, with a duty to account to her, will vindicate her interest with respect to the past. It will vindicate the interest of the state to repose of title.[17] Under the circumstances the interest of the state against alien ownership of land will be protected by a requirement that the widow dispose of her equitable interest within three years (plus reasonable prolongation) of the end of the litigation declaring her interest.

I have discussed this case under the law of fiduciary relationships and trusts. Precisely the same consequences attach, however, if it is approached in terms of a confidential relationship, which can exist where there is no fiduciary relation, and particularly arises between persons in a familial relationship where one reposes confidence in the other and such other abuses the confidence placed in him. 1 Scott § 2.5. The same result also ensues if one applies plain vanilla estoppel.

I have no doubt that the courts of Mississippi, like the Mississippi federal District Judge, would not permit this fiduciary to enrich himself by the abuse of a position of trust within his family. I respectfully dissent from the majority opinion which does permit that unfortunate and inequitable consequence.

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17. In *Guiseppe*, 25 years had elapsed since the Italian nieces and nephews acquired title. During that time the Mississippi niece had sold off three parcels of land and granted a utility easement. The Supreme Court remanded for an adjudication of respective ownership interests and an accounting of net rentals and sale proceeds from 1933 to 1967, the date of the decision.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1082

DOROTEA ZALDIVAR V. DE TENORIO,
Plaintiff-Appellee

vs.

H. E. McGOWAN, ET AL,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

PETITION OF APPELLEES FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Now come the appellees, Dorotea Zaldivar V. de Tenorio, et al., and respectfully petition the Court for a rehearing and suggest a rehearing en banc, and in support hereof would show that the case involves exceptionally important questions of constitutional and treaty and local land law. Petitioners respectfully submit that the majority opinion:

1. Misapplies the Treaty existing between the United States and the Republic of Honduras;

2. Misconstrues the Treaty by failing to follow the rule of liberal construction mandated by the Supreme Court of the United States;

3. Fails to follow the "clearly erroneous" rule;

4. Fails to apply the Treaty requirement for "the most constant protection and security" and for due process and just compensation;

5. Overlooks circumstances rendering a prolongation of time necessary for disposition of property under the Treaty;

6. Erroneously views the decision of the District Court as allowing aliens to make a shambles of land titles;

7. Permits an invidious statutory discrimination contrary to the Constitution of the United States and the specific terms of the Treaty; and

8. Fails to apply controlling Mississippi case law.

In support thereof, petitioners submit the sub-joined brief.

ARGUMENT SUPPORTING PETITION FOR REHEARING

I.

INTRODUCTORY

Involved is the title to 37 acres of Mississippi land in Clarke County. The question is whether title is protected in favor of two Honduran Nationals, Dorotea Zaldivar V. de Tenorio and Philipe Zaldivar, and assigns, appellees, or was forfeited to a local citizen, Hamilton E. McGowan, and assigns, appellants.

The case turns upon the construction of a Treaty with the Republic of Honduras. The District Court (Chief Judge Dan M. Russell) found the facts and the law in favor of the Honduran Nationals and against the claim of McGowan. *364 F.Supp. 1051.* But on appeal, the decision was reversed by a divided Panel. (Slip Op. p. 4514-4535, March 19, 1975).

Because of similar existing provisions, the Panel decision sets a precedent which will adversely affect reciprocal property rights under treaties with at least 23 nations around the world,—a fact which magnifies the importance of the treaty issues. A schedule of the affected treaties, appropriately grouped, is included in the Addendum (AD-7-9) along with a copy of the Mississippi Statute (AD-1) and pertinent excerpts from the Treaty with the Republic of Honduras (AD-2-6).

Because of the exceptional importance of the Treaty questions and in view of Judge Godbold's very strong dissent, a rehearing en banc is requested.

II.

ULTIMATE FACTS

The land was acquired by Elbert J. McGowan about 1915. Appellant, Hamilton E. McGowan, was Elbert's brother and both lived, at the time, in Vossburg, in rural Clarke County. About this time Elbert left for Central America and returned infrequently.

On leaving, Elbert entrusted his land to his brother Hamilton, who agreed to look after the place and pay the taxes "as a favor to his brother and for use of said lands."[1]

In 1940, Elbert married a native Honduran, Maria Obdulia Zaldivar, and lived with her in Central America until his death, seventeen years later. Neither Elbert nor his Honduran wife changed citizenship. Elbert never brought his wife, a non-white, to Clarke County, Mississippi. She spoke very little English. Maria Obdulia Zaldivar McGowan was Elbert's sole heir.

Elbert's passport named his brother Hamilton as a person to be notified in case of his death. When Elbert died in 1957, Hamilton was so notified in writing by the United States consul in Panama. This notice revealed that Elbert was survived by his Honduran widow and gave her name and address. Hamilton received the notice and produced it for the trial. (Exh. P-6).

Elbert left some properties in Panama and there were some legal proceeding there to clear the title, but his widow had no knowledge of Elbert's land ownership in Clarke County. No formal administration was opened upon his estate in Mississippi, but Hamilton had the land tax assessment changed from Elbert (E. J.) McGowan to the "E. J. McGowan Est." (Exh. P-12).

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[1] This arrangement continued without interruption or change until August 14, 1968, as explained later.

Hamilton did not communicate with Elbert's widow or make any effort to do so, but continued to manage Elbert's land as he had done for the 42 years prior to his death, using the land then assessed to his brother's estate and keeping the profits for the payment of taxes just as before.

This went along without change until August 14, 1968, when Hamilton filed a suit in the Chancery Court asserting publicly for the first time, title to Elbert's land by "adverse possession," claiming a parole gift in 1936.[2] This was a farce designed only to deprive Elbert's widow of her inheritance.[3] Hamilton named his brothers and sisters as defendants, exclusive of Elbert, of course, and made no effort whatever to notify Elbert's widow. In default of an answer by the friendly defendants, Hamilton took a decree purporting to confirm title in him.[4] He then promptly gave deeds to his brothers and sisters, defendants in the case, for an interest in the minerals, but Obdulia was not so favored. He then had the tax assessment changed again, this time from "E. J. McGowan Est." to himself, "H. E. McGowan."

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[2] Miss. Code 1972, §15-1-13. Ten years open hostile possession under claim of title will vest title in the claimant, but if possession is permissive, there must be a legal "ouster" of the record title owner, which requires notice.

[3] One of the defendants, M. M. McGowan, was a lawyer, and he actually drafted the complaint which named himself as a defendant.

[4] The District Court held that this decree was void as to Obdulia for lack of due process notice and appellants abandoned any claim thereunder, but the proceedings serve to show Hamilton's hostility toward Elbert's widow and his determination to deprive her of her rightful inheritance without notice.

Obdulia died several months later in Honduras on February 28, 1969, still ignorant of her Clarke County inheritance and wholly unaware of the proceedings designed to take away the land and vest it in Hamilton by a claim of parole gift[5] and "adverse possession."

Obdulia was survived by a sister, the appellee, Dorotea Zaldivar V. de Tenorio, with whom she had lived in Honduras since her husband's death in 1957, and one brother, whose assignees are appellees also. After her sister's death, Dorotea learned of Elbert's land in Clarke County, when she was approached to give an oil lease. The present suit followed and was filed on April 12, 1971, two years after Obdulia's death.

III.

THE TREATY AND THE STATUTE

Mississippi has a statute which allows resident aliens to acquire and hold land "but non-resident aliens shall not hereafter acquire or hold land," *except* that "non-resident aliens who are citizens of Syria or the Lebanese Republic may inherit property. . . ." Miss. Code 1972, §89-1-23 (Code 1942, §842). (AD-1)

Honduran Nationals are not included in the exception, so we turn to the "Treaty of Friendship, Commerce and Consular Rights" between the United States and the Republic of Honduras:

Article I provides that the Nationals of each High Contracting Party:

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[5] The same "parole gift" was asserted in the case at bar, but there was no attempt to prove the assertion and the "adverse possession" claim evaporated for want of even an arguable justification.

> ". . . shall receive . . . the most constant protection and security for their persons and property. . . Their property shall not be taken without due process of law and without payment of just compensation." (AD-3)

The above serves as a part of the Supreme Law of the Land and overrides any law of a state which provides for anything less. United States Constitution, Article 6, Clause 2; *Hauenstein* v. *Lynham,* 100 U.S. 483, 25 L.Ed. 628 (1879); *Clark* v. *Allen,* 331 U.S. 503, 67 S. Ct. 1431 (1947); *Guiseppe* v. *Cozzani,* 248 Miss. 588, 159 So.2d 278 (1964).

The only concession in the Treaty to the state law is found in *Article IV*. This provides that if aliens are disqualified to take property by local law, they "shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary." (AD-5)

The prolongation of the time is "to be" reasonably prolonged if necessary. The language is mandatory.[6] Left open for interpretation is the phrase "reasonably prolonged." Also, left open is the question of what kind of "circumstances" may render it "necessary" to prolong the time.

IV.

CONSTRUCTION OF TREATY MUST BE LIBERAL

Judge Coleman would cast upon the Nationals of the High Contracting Parties the duty to ascertain, at their peril, the status of the title to land by inquiry and search of records. Neglect to successfully launch such a search and ascertain the fact of inheritance and take action is said to divest the Honduran Nationals of their inheritance.

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[6] Some treaties use the phrase "may be" instead of "to be". Cf. Austrian Treaty, 9 U.S. Stat. at Large, 945, changed by the Treaty of 1928 to "to be", 47 Stat. 1876. See also Treaty with Latvia which uses "may be" (45 Stat. 2641).

This results in an extremely strict and narrow construction of the Treaty. But the prevailing canon requires an opposite approach.

Treaties are to be liberally construed to give effect to the apparent intentions and purposes of the respective nations and in order that justice may be done. 87 *C. J. S., Treaties,* §13(d). Therefore, where a treaty fairly admits of two constructions, one restrictive of the rights that may be claimed under it and the other favorable to such rights, the latter is to be preferred. The rule is based on considerations which should govern relations between nations and the good faith of treaties, and narrow and restricted constructions are to be avoided. This canon of construction is settled: *Factor* v. *Laubenheimer,* 290 U.S. 276, 54 S. Ct. 191 (1934), and cases cited. Also: *Bacardi Corp. of America* v. *Domenech,* 311 U.S. 150, 61 S. Ct. 219 (1940); *Jordan* v. *Tashvio,* 278 U.S. 123, 49 S. Ct. 123.

With deference, the majority opinion takes a view which is at war with the spirit expressed in the treaty admonition that the Nationals of each country "shall receive . . . the most constant protection and security for their persons and property," which under no circumstances may be taken "without due process of law and without payment of just compensation." In so doing, the majority adopts not a liberal but a narrow and restricted and even a strained construction of the Treaty, contrary to the prevailing canon adopted by the Supreme Court.

Obdulia was ignorant of her inheritance, but Hamilton McGowan was not. Hamilton was his brother's agent,—a trusted fiduciary. Until he delivered his brother's property to his lawful widow or gave her notice that he would refuse to do so, he continued in the same relation toward her. But when Elbert died, Hamilton developed a secret hostility toward Elbert's widow, which could only have been born of a desire to take his brother's land and deprive his lawful widow of her inheritance. This hostility surfaced to view only when Hamilton filed the spurious Chancery Court suit in 1968, falsely claiming an oral gift.

All of these circumstances were considered by the District Judge and were found to require prolongation of the time for the Honduran heirs to effectively claim their inheritance.

Judge Godbold pointed out that the misconduct of Hamilton McGowan in claiming his brother's land for his own was "too strong for the nostrils of an able and experienced trial judge. It is too strong for mine as well." (Slip Op. p. 4526).

If deprivation of Elbert's widow and her kin was too strong for the nostrils of two out of the four able and experienced judges who have looked at the case thus far, it is difficult to reconcile the deprivation with the spirit of a Treaty which mandates that the property shall have "the most constant protection and security." The able District Judge found Hamilton to be a fiduciary toward his brother and his brother's widow.[7] Judge Godbold agreed and pointed out that the same result ensues "if one applies plain vanilla estoppel."

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[7] It matters not whether Hamilton is given the title of a Tenant at Sufferance or other name. His was a position of trust nevertheless. He could not claim adversely without giving notice in any case. Cf. case cited by Judge Coleman in footnote No. 2.

We deal with a sensitive subject. The Treaty paves a two-way street. The Honduran Treaty is called a "Treaty of Friendship." It embraces the Golden Rule. It borrows from our own Constitution to guarantee justice and due process of law. The spirit is one of constant protection, security and friendship, not of hostility and forfeiture. It should be applied in this spirit, not grudgingly and narrowly, but liberally and broadly to assure, in practice, that "*most constant protection and security*" of which it speaks so eloquently and which the Nationals of each country were led to expect in territories of the other.

V.

OTHER POINTS REQUIRE REHEARING

(A) "CLEARLY ERRONEOUS" RULE DISREGARDED

Judge Godbold points out that Judge Coleman reverses "without a tip of the hat to the plainly erroneous rule." (Slip Op. p. 5436).

F.R.Civ.P. No. 52 provides that findings of fact shall not be set aside "unless clearly erroneous." Cf. *Volkswagen of America* v. *Jahre,* 472 F.2d 557 (CA5, 1973). The same "clearly erroneous" rule extends to decisions on questions of local law. Under this rule a trial judge must be affirmed if he has reached a "permissible conclusion." See: *Western Cas. and Surety Co.* v. *Herman,* 318 F.2d 50 (CA8, 1963); *Harris* v. *Hercules, Incorporated,* 455 F.2d 267 (CA8, 1972). Cf. *Petersen* v. *Klos,* 433 F.2d 911 (CA5, 1970) and cases cited.

The majority opinion assigns no reason for disregarding this rule governing review of findings of fact and law.

(B) "JUST COMPENSATION" IGNORED

The Treaty says that the Nationals' property shall not be taken without just compensation. Judge Coleman reads this to mean that it may not be taken by the *government*. But the Treaty does not say so. Unlike our Constitution, the Treaty makes no reference to "public use"; it simply says that the property shall not be taken "without payment of just compensation."

Even so, the Treaty giveth and the State, by its statute, taketh away. The fact that the taking is by the state for the use of a citizen, instead of for the use of the state itself, matters little to the victim. This hair splitting again ignores the requirement for liberal construction.

(C) "DUE PROCESS OF LAW" NOT REGARDED

Judge Coleman took the view that the Treaty's due process requirement was satisfied when Mrs. Tenorio had her day in Court in this case. But the trial is supposed to come before the taking. The majority holds that the widow's property had been taken before she or her heirs ever got to court. This is not the "freedom of access to the courts of justice" that the Treaty speaks of in Article I, third paragraph. Here again, the majority rejects the liberal interpretation which the law requires.

(D) CIRCUMSTANCES RENDERED PROLONGATION NECESSARY

Again taking a highly restrictive view, Judge Coleman limits the "circumstances" which render prolongation necessary to those existing during the first three years, such as "inability to satisfactorily clear title, an inability to sell for fair market value, wilful frustration of the effect to sell, and like events."

The most obvious answer to this is that the Treaty might have so limited the right to prolongation but did not do so. Instead, Article IV uses broad general terms which take meaning from Article I, which, in turn, speaks broadly of "freedom of access to the courts of justice" and to the right to receive "the most constant protection and security" and to the prohibition against any taking at all "without due process of law and without payment of just compensation."

We are admonished by the Supreme Court to read the whole of the Treaty with a view of enlarging, not with a view of restricting, rights which may be claimed under it. As put in *Bacardi Corporation of America* v. *Domenech*, 311 U.S. 150, 61 S.Ct. 219 (1940):

> ". . . According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred. . . ." (61 S.Ct. at 225-226).

Even if the Treaty were subject to so restrictive a construction, the widow's right should still be protected, because Hamilton was in physical possession of the land and was secretly hostile to his brother's widow and secretly intended to claim the property as his own, as he ultimately did. Under these circumstances, it is not likely that Obdulia would have met with anything but frustration had she attempted to sell her property. The District Judge had the right to weigh this factor, as he undoubtedly did.

(E) A "SHAMBLES" IS NOT MADE OF LAND TITLES

Judge Coleman appears to have been strongly influenced by the notion that unless the three year period for sale were strictly enforced, it would "make a shambles of land titles." With deference, this is just not so. The title was not a shambles merely because it rested with an alien to whom the United States had agreed to give the "most constant protection and security."

The three-year-plus-prolongation-if-necessary provision was designed to accommodate local policy against aliens holding land and not to avoid possible uncertainty regarding where the title rested. Our prime alarm here is based upon the existence of such strongly expressed and prejudicial feelings as that the widow's heirs "dusted off" the Treaty in "an effort to scramble title" when "an oil well had been brought in." These are hostile words. They cloud the entire opinion, yet, with deference, fail to find a logical justification in fact and, at the same time, violate the spirit of friendship which the Treaty is designed to foster.

(F) DISCRIMINATION IS IMPERMISSIBLE

Early cases have held that a state may exclude *all* aliens from holding land. *Terrace* v. *Thompson*, 263 U.S. 197, 44 S.Ct. 15 (1923), but the continuing validity of those decisions has been cast in doubt. *Graham* v. *Richardson*, 403 U.S. 365, 91 S.Ct. 1848 (1971), esp. p. 91 S.Ct. at p. 1853.

In any event, the Mississippi statute does not exclude *all* aliens. It allows non-resident alien Nationals of Syria and the Lebanese Republic to inherit and hold land in Mississippi, excluding other non-resident aliens.

Judge Coleman considers that this picking and choosing among aliens is permissible because the Fourteenth Amendment's equal protection clause applies only to persons born and naturalized in the United States.

However, the Treaty embodies the equivalent of the Fifth and Fourteenth Amendments. Invidious discrimination is also condemned by the due process clause, as to which see *Rolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693; *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F.2d 471 (CA8, 1973), and cases cited. The statute also violates other constitutional provisions geared to the nation's foreign policy. *Zschernig* v. *Miller*, 389 U.S. 429, 88 S.Ct. 664 (1968).

For detailed discussion, see our initial brief, p. 18-26.

(G) GUISEPPE v. COZZANI IS NOT DISTINGUISHABLE

Judge Coleman would distinguish *Guiseppe* v. *Cozzani*,[8] the Mississippi case in point cited by appellees, on the ground that, "The case turned on fraud, not on an extension of time under a Treaty." With deference, this won't do.

Guiseppe involved two points. One was the application of the Treaty with Italy to allow the Italian aliens to inherit in the first place. The second was whether the aliens, having inherited, were barred by the claimed adverse possession of a resident relative. The fraud point went only to the question of the notice required to claim title by adverse possession, not to the possible loss of title under the Treaty.

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[8] 238 Miss. 273, 118 So.2d 189 (1960); 248 Miss. 588, 159 So.2d 278 (1964); 193 So.2d 549 (1966) (three opinions).

Just as the District Court held here that Hamilton acquired no title by adverse possession (from which there was no appeal), because there was no "ouster" notice of the true owners, so the Guiseppe Court held there was no ouster of co-tenants in Italy by reason of a Court decree entered without notice and based upon false affidavits to the effect that there were no other living heirs. The result in both cases on this point was the same.

If fraud is important, it finds a substantial counterpart in the case sub judice, but the significant Treaty point is made without regard to fraud. On this point the Guiseppe Court held expressly or by necessary implication: (1) that the Treaty with Italy, similar to the one here involved, voided the statute; (2) that the Italian aliens inherited title by virtue of the Treaty; (3) that the title was a vested one, and (4) that the title was not lost by the mere passage of time (25 years) or neglect to inquire or examine public records.

The same is true here. Obdulia took a vested title under the Treaty by inheritance from Elbert, her husband. The title once so vested in Obdulia, was not lost by mere lapse of time or neglect to inquire or examine public records. *Guiseppe* stands firmly for these propositions.

The dubious distinction suggested by Judge Coleman simply will not stand against a careful reading of the *Guiseppe* opinions. Treaty rights are not to be defeated by doubtful distinctions any more than by narrow or strained constructions.

The Mississippi Court did not strain to exclude aliens from holding Mississippi land and, with deference, this Court should not do so either.

Respectfully submitted,

/s/ David A. Kattan
David A. Kattan
/s/ Paul M. Neville
Paul M. Neville
/s/ Vardaman S. Dunn
Vardaman S. Dunn

APPENDIX D

Dorotea Zaldivar V. DE TENORIO,
Plaintiff-Appellee,

v.

H. E. McGOWAN et al.,
Defendants-Appellants.

No. 74-1082.

United States Court of Appeals,
Fifth Circuit.

May 27, 1975.

Citizen of Republic of Honduras brought action against Mississippi residents to confirm her title and interest in 37 acres of land in Mississippi which she allegedly had inherited from her deceased sister, who in turn allegedly had inherited from her deceased husband, a United States citizen. The United States District Court for the Southern District of Mississippi, Dan M. Russell, Jr., Chief Judge, 364 F.Supp. 1051, entered judgment for plaintiff, and defendants appealed. The Court of Appeals, Coleman, Circuit Judge, 510 F.2d 92, reversed on ground that defendant had no fiduciary duty to notify widow of her obligation to sell property within three years after husband's death or lose her interest under treaty provisions, and plaintiff petitioned for rehearing and for rehearing en banc. The Court of Appeals held that court's decision enforcing three-year period of limitations expressly provided for under 1928 treaty with Honduras, in the absence of any showing of necessity beyond desire of plaintiff to obtain legal title to land in Mississippi and its producing oil well, did not damage fabric of United States treaty commitments.

Petitions denied.

Godbold, Circuit Judge, dissented.

1. Treaties (Key) 8

Court of Appeals' decision enforcing three-year period of limitations expressly provided for under 1928 treaty with Honduras, in the absence of any showing of necessity beyond desire of plaintiff to obtain legal title to land in Mississippi and its producing oil well, did not damage fabric of United States treaty commitments.

2. Courts (Key) 406.3(24)

If district court made inferential fact-finding that Honduran widow who owned property in Mississippi and who was vested with title to land which her husband, a United States citizen, had formerly owned was owed fiduciary obligation by husband's brother, such finding of fact was clearly erroneous.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 19, 1975, 5 Cir., 510 F.2d 92)

Before COLEMAN, GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

The petition for rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 25 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is denied.

Counsel for the plaintiff-appellee have filed a vigorous petition for rehearing. Much of it retraces the arguments previously advanced and previously rejected.

Nevertheless, the Court considers it not out of order to comment upon some of the points which the petition seeks to raise.

[1] First, it is asserted that our decision "sets a precedent which will adversely affect reciprocal property rights under treaties with at least twenty three nations around the world". We cannot agree. This case has been decided on its own peculiar facts. The deceased lady, Maria Obdulia Zaldivar McGowan, was first vested with her Honduran Treaty rights on October 31, 1957. In the absence of a necessity for prolongation those rights expired October 31, 1960. She died February 28, 1969 without taking any action whatsoever to dispose of the property under Article IV of the Treaty or to seek an adjudication that a reasonable prolongation was necessary. It remained for

her heirs to champion such a necessity long after the expiration of the term of years specified by the Treaty. We were of the opinion that no such necessity had been shown. How this damages the fabric of the Honduran, or any similar, Treaty is not apparent.

[2] It is next said that our decision ignores the clearly erroneous rule. The District Court did say, 364 F.Supp. 1051, at 1060, that Hamilton McGowan occupied a fiduciary relationship toward E. J. McGowan. There was no finding of fact, except possibly by inference, to the effect that Hamilton McGowan occupied a fiduciary relationship toward the deceased widow. If there was such a finding, our prior opinion conclusively demonstrates, we think, that it was clearly erroneous.

We thus found it unnecessary to reach or decide whether existence of such a fiduciary relationship, had it existed, would have provided the "necessity" for a "reasonable prolongation". Neither did we decide whether a prolongation of eight years would have been reasonable. Moreover, we did not decide whether, after a delay of eleven years (1960-1971) the heirs of one originally vested with the right could inherit that right.

In sum, the petition for rehearing it replete with arguments that this Court should not enforce the three year period of limitations expressly provided by the Treaty and insists that we should decree a necessity for quadrupling that term when no necessity is shown beyond the desire of the widow's heirs (and their grantees) to obtain legal title to the land and its producing oil well

We adhere to our published opinion.

GODBOLD, Circuit Judge.

I dissent.

APPENDIX E

HONDURAN TREATY[1]

(ARTICLES I-V)

By the President of the United States of America

A PROCLAMATION

WHEREAS a Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras was concluded and signed by their respective Plenipotentiaries at Tegucigalpa on the seventh day of December, one thousand nine hundred and twenty-seven, the original of which Treaty, being in the English and Spanish languages, is word for word as follows:

> The United States of America and the Republic of Honduras desirous of strengthening the bond of peace which happily prevails between them, by arrangements designed to promote friendly intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the peoples thereof, have resolved to conclude a Treaty of Friendship, Commerce and Consular Rights, and for that purpose have appointed as their plenipotentiaries:
>
> The President of the United States of America, George T. Summerlin, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, and

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[1] 45 Stat. 2618.

The President of the Republic of Honduras, Doctor Fausto Dávila, Minister for Foreign Affairs of the Republic of Honduras,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

Article I

The nationals of each of the High Contracting Parties shall be permitted to enter, travel and reside in the territories of the other; to exercise liberty of conscience and freedom of worship; to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established.

The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

Nothing contained in this Treaty shall be construed to affect existing statutes of either of the High Contracting Parties in relation to the immigration of aliens or the right of either of the High Contracting Parties to enact such statutes.

Article II

With respect to that form of protection granted by National, State or Provincial laws establishing civil liability for injuries or for death, and giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary benefit, such relatives or heirs or dependents of the injured party, himself a national of either of the High Contracting Parties and within any of the territories of the other, shall regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.

Article III

The dwellings, warehouses, manufactories, shops, and other places of business, and all premises thereto appertaining of the nationals of each of the High Contracting Parties in the territories of the other, used for any purposes set forth in Article I, shall be respected. It shall not be allowable to make a domiciliary visit to, or search of any such buildings and premises, or there to examine and inspect books, papers or accounts, except under the conditions and in conformity with the forms prescribed by the laws, ordinances and regulations for nationals.

Article IV

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

Article V

The nationals of each of the High Contracting Parties in the exercise of the right of freedom of worship, within the territories of the other, as hereinabove provided, may, without annoyance or molestation of any kind by reason of their religious belief or otherwise, conduct services either within their own houses or within any appropriate buildings which they may be at liberty to erect and maintain in convenient situations, provided their teachings or practices are not contrary to public morals; and they may also be permitted to bury their dead according to their religious customs in suitable and convenient places established and maintained for the purpose, subject to the reasonable mortuary and sanitary laws and regulations of the place of burial.

APPENDIX F

MISSISSIPPI CODE SECTION

(Code 1942, §842; Code 1972, §89-1-23)

Aliens holding land.

Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may; but non-resident aliens shall not hereafter acquire or hold land, but a non-resident alien may have or take a lien on land to secure a debt, and at any sale thereof to enforce payment of the debt may purchase the same, and thereafter hold it, not longer than twenty years, with full power during said time to sell the same, in fee, to a citizen; or he may retain it by becoming a citizen within that time. All land held or acquired contrary to this section shall escheat to the state; but a title to real estate in the name of a citizen of the United States or a person who has declared his intention of becoming a citizen, whether resident or non-resident, if he be a purchaser or holder, shall not be forfeited or escheated by reason of the alienage of any former owner or other person.

Provided, however, any person who was or is a citizen of the United States and became or becomes an alien by reason of marriage to a citizen of a foreign country, may hereafter inherit, or if he or she heretofore inherited or acquired or hereafter inherits, may hold, own, transmit by descent or transfer land free from any escheat to the state of Mississippi, if said land has not heretofore escheated by final valid order or decree of a court of competent jurisdiction.

Provided, further, non-resident aliens who are citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the state of Mississippi.

Any and all pending suits on behalf of the state of Mississippi seeking to escheat lands of any person who is excepted by this act, are hereby abated, and the land commissioner of Mississippi is hereby directed to dismiss said suits, provided, however, that the defendant or defendants in said suits pay all costs of court and reasonable attorney's fees, to be fixed by the chancery court in which said suits are pending.

APPENDIX G

SCHEDULE OF TREATIES AFFECTED BY DECISION

On a review of the thirty-one Treaties with the United States dealing in some manner expressly with reciprocal rights to acquire and hold land by the Nationals of the respective High Contracting Parties in the territories of each other, it is found that these fall into the following four groups:

GROUP I

Twelve (12) treaties use the same language as that found in Article IV of the Treaty with the Republic of Honduras that ". . . such National shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary. . ."

Country	Date	Art. No.	Code Citation[2]
Austria	1928	IV	47 Stat. 1876
China	1946	VII	63 Stat. 1299
Estonia	1925	IV	44 Stat. 2379
Finland	1934	IV	49 Stat. 2659
Guatemala	1901	I	32 Stat. 1944
Honduras	1927	IV	45 Stat. 2618
Italy	1948	VII	63 Stat. 2255
Latvia	1928	IV	45 Stat. 2641
Liberia	1938	IV	54 Stat. 1739
Norway	1928	IV	47 Stat. 2135
Spain	1902	III	33 Stat. 2105
United Kingdom[3]	1899	I	31 Stat. 1939

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[2] Stat.—*United States Statutes at Large*

UST—*United States Treaties and Other International Agreements* (Successor to United States Statutes at Large)

[3] The provisions were made applicable to: Australia, Barbados, Botswana, Burma, Canada, Ceylon, Cyprus, Figi, Gambia, Ghana, Guyana, India, Jamaca, Malaysia, Malta, Mauritius, New Zealand, Nigeria, Sierra Leone, Singapore, South Africa, Swaziland, Trinidad, Tobago and Zambia.

GROUP II

Nine (9) treaties of more recent vintage use the variation that the Nationals shall be allowed "*at least* five years" in which to dispose of real estate.

Country	Date	Art. No.	Code Citation
Denmark	1951	IX(4)	12 UST 908
France	1959	VII(11)	11 UST 2398
Germany	1954	IX(3)	7 UST 1839
Greece	1951	IX(2)	5 UST 1829
Israel	1951	IX(4)	5 UST 550
Japan	1953	IX(3)	4 UST 2063
Korea	1956	IX(3)	8 UST 2217
Luxembourg	1963	IV(3)	14 UST 251
Pakistan	1959	IX(2)	12 UST 110

GROUP III

Two (2) treaties provide for "a reasonable period in which to dispose of it in a normal manner at its market value."

Country	Date	Art. No.	Code Citation
Ireland	1950	VII(1)	1 UST 785
Netherlands	1956	IX(4)	8 UST 2043

GROUP IV

Other types include one which allows disposition "at will."[4] Two provide simply for "national treatment" in relation to acquiring and holding land.[5] Two provide for treatment on a footing of "the most favored nation."[6] One simply provides for "complete protection and security for themselves and for any property.[7] Two leave it to whatever time the local or state law permits.[8]

GROUP V

The Treaty with the Republic of Honduras stands alone in the provisions found in Article I, fourth paragraph, which guarantees the "most constant protection and security for their . . . property"[9] and which concludes: "Their property shall not be taken without due process of law and without just compensation." (AD-3, supra).

4.	Columbia	1846	XII	9 Stat. 881
5.	Thailand	1966	V	19 UST 5843
	Togo	1966	VI	18 UST 1
6.	Sweden	1910	XIV	37 Stat. 1479
	Yugoslavia	1882	II	22 Stat. 963
7.	Brunei	1850	III	10 Stat. 909
8.	Bolivia	1858	12	12 Stat. 1003
	Switzerland	1850	V(3)	11 Stat. 587

[9] Cf. Treaty with Brunei which provides for "complete protection and security" but omits reference to due process and just compensation.